LIBRARY
SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
OCT 5 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 647

SOUTH FLORIDA TELEVISION CORPORATION, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, and L. B. WILSON, INCORPORATED, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SCOTT W. LUCAS
JOSEPH B. FRIEDMAN
1028 Connecticut Ave., N. W.
Washington, D. C. 20036
Attorneys for South Florida Television Corporation

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	2
Reasons for Granting the Writ	6
Conclusion	19

Appendix A—Opinion of the Court of Appeals	1a
Appendix B—Decision of the Federal Communications Commission	6a
Appendix C—Statute Involved	28a
Appendix D—FCC Policy Statement on Comparative Broadcast Hearings	31a

CITATIONS

CASES:

Ashbacker Radio Corp. v. *FCC*, 326 U.S. 327 (1945)	14
Charles County Broadcasting, Inc., 4 Pike & Fischer Radio Reg. 2d 196 (1965)	9
Churchill Tabernacle v. *FCC*, 81 U.S. App. D.C. 411, 160 F. 2d 244 (1947)	9
Community Broadcasting Co. v. *FCC*, 107 U.S. App. D.C. 95, 274 F. 2d 753 (1960)	9, 15, 17
Evangelical Lutheran Synod v. *FCC*, 70 App. D.C. 270, 105 F. 2d 793 (1939)	8
FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940)	14
FCC v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940)	13

Page

L. B. Wilson, Inc., 20 Pike & Fischer Radio Reg. 736b (1962) 4
L. B. Wilson, Inc. v. *FCC*, 83 U.S. App. D.C. 176, 170 F. 2d 793 (1948) 9
Public Service Television, Inc. v. *FCC*, 115 U.S. App. D.C. 200, 317 F. 2d 900 (1962) 15
Sunbeam Television Corp., 38 F.C.C. 805 (1965) 9
WHDH, Inc., FCC Docket No. 15204 et al. 9
WKAT, Inc., 29 F.C.C. 216 (1960) 4
WKAT, Inc., 22 F.C.C. 117 (1957) 3
WKAT, Inc. v. *FCC*, 111 U.S. App. D.C. 253, 296 F. 2d 374 (1961), *cert. denied sub nom. Public Service Television, Inc.* v. *FCC*, 368 U.S. 841 (1962) 4
WKAT, Inc. v. *FCC*, 103 U.S. App. D.C. 324, 258 F. 2d 418 (1958) 3
Yankee Network v. *FCC*, 71 App. D.C. 11, 107 F. 2d 212 (1939) 9

STATUTE:

Communications Act of 1934, as amended:

Section 301, 48 Stat. 1081 (1934), 47 U.S.C. § 301 (1964 ed.) 6, 10
Section 304, 48 Stat. 1083 (1934), 47 U.S.C. § 304 (1964 ed.) 10
Section 307, 48 Stat. 1083 (1934), 66 Stat. 714 (1952), 74 Stat. 889 (1960), 47 U.S.C. § 307 (1964 ed.) 10, 11, 14
Section 309, 74 Stat. 889 (1960), 47 U.S.C. § 309 (1964 ed.) 10, 14

MISCELLANEOUS:

"Broadcast Regulations and Intermedium Competition," 45 Va. L. Rev. 1104 (1959) 9
Communications Act Amendments, 1952; Senate Report No. 44, 82d Cong., 1st Sess. (Jan. 25, 1951), and House Report No. 1750, 82d Cong., 2d Sess. (April 8, 1952) 11
"Competition or Control II: Radio and Television Broadcasting," 107 U. Pa. L. Rev. 585 (1959) 9

Page

FCC, *Annual Report for Fiscal Year 1964* 9

FCC, *Policy Statement on Comparative Broadcast Hearings,* 5 Pike & Fischer Radio Reg. 2d 1901 (1965) 7, 8

Warner, *Radio and Television Law* (1949) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

SOUTH FLORIDA TELEVISION CORPORATION, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, and L. B. WILSON, INCORPORATED, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on July 8, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals, included within the certified record before this Court, is unreported and is printed in Appendix A hereto, *infra*. The decision of the Federal Communications Commission printed in Appendix B hereto, *infra*, is reported at 37 F.C.C.

511 (1964) and appears as such in the Supplemental Joint Appendix included within the certified record before this Court.

JURISDICTION

The judgment of the Court of Appeals affirming the decision of the Commission was entered on July 8, 1965. See Appendix A, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1) and 47 U.S.C., Section 402(j).

QUESTION PRESENTED

Whether the Federal Communications Commission may in a comparative proceeding lawfully award a preference to a broadcast licensee by reference to its incumbency *per se* as a licensee, in the context of a case wherein this larger question is accentuated by the award of such a preference to a party whose limited operating authority was granted and justified for the purpose of continuing a previously existing television service pending the resolution of a comparative hearing to determine the best qualified applicant for the facility.

STATUTE INVOLVED

The provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C., Section 151 *et seq.*, which are involved are printed in Appendix C, *infra*.

STATEMENT

The Federal Communications Commission has denied petitioner's application for a permit to construct a television station on Channel 10 in Miami, Florida, and granted a mutually exclusive application for the chan-

nel filed by L. B. Wilson, Inc. Review of the Commission's decision was sought in the United States Court of Appeals for the District of Columbia Circuit, the jurisdiction of which was invoked under the provisions of Section 402(b)(1) and (c) of the Communications Act of 1934, as amended (66 Stat. 718, 47 U.S.C., Sections 402(b)(1) and (c)), and Section 10 of the Administrative Procedure Act (60 Stat. 243, 5 U.S.C., Section 1009). The Court of Appeals, with Judge Wright dissenting, affirmed the Commission's decision.

The material facts for the purpose of this petition may be summarized as follows:

In 1953 the Commission designated for hearing four mutually-exclusive applications for a permit to construct a television station on Channel 10 in Miami. In 1957 the Commission decided that Public Service Television, Inc., was the best qualified and L. B. Wilson, Inc., respondent herein, the least qualified of the four competing applicants. *WKAT, Inc.,* 22 F.C.C. 117, 209 (1957). Pursuant to this decision Public Service constructed a station and commenced operation.

During the pendency of an appeal from the Commission's decision granting Channel 10 to Public Service, a Congressional investigation revealed improper *ex parte* contacts with members of the Commission by one or more of the applicants. The case was remanded to the Commission at its request, *WKAT, Inc.* v. *FCC,* 103 U.S. App. D.C. 324, 258 F. 2d 418 (1958), whereupon the Commission found that all of the competing applicants except L. B. Wilson, Inc., were disqualified because of improper conduct. The result was a grant for a term of only four months "by de-

fault" of Wilson's application. *WKAT, Inc.*, 29 F.C.C. 216, 218 (1960).

The Court of Appeals approved the short-term authorization to Wilson in view of "the purpose of resolving a difficult practical problem," and in appreciation of the fact that

> ". . . a license to L. B. Wilson for a full term, without comparative consideration with any new applicant, would give Wilson a measure of advantage which, in view of all the surrounding circumstances, was deemed by the Commission to be unwise. We think the decision reached by the Commission was well within its authority and was a reasonable one." *WKAT, Inc.* v. *FCC*, 111 U.S. App. D.C. 253, 262-263, 296 F. 2d 374, 383-84 (1961), *cert. denied sub nom. Public Service Television, Inc.* v. *FCC*, 368 U.S. 841 (1962).

On February 16, 1962, the Commission issued an order stating that Wilson's four-month grant ended on March 20, 1962, and directed Wilson to file its application for renewal of license on or before that date. The order further announced that Channel 10 would be available for the filing of mutually-exclusive applications by new applicants. *L. B. Wilson, Inc.*, 20 Pike & Fischer Radio Reg. 736b, 736c (1962). Wilson and three other applicants, including petitioner, thereupon filed applications for Channel 10, and after an extensive hearing, the examiner rendered an Initial Decision (37 F.C.C. 534)[1] granting the application of petitioner and denying the applications of the other two applicants and Wilson. The examiner rated Wilson

[1] The Initial Decision of the hearing examiner, cited as such herein, may be found in the Supplemental Joint Appendix included within the certified record before this Court.

third among the four applicants. This decision was reversed by the Commission, which on July 29, 1964, granted the application of Wilson and denied that of the other two applicants and petitioner. Chairman E. William Henry dissented in favor of the petitioner. 37 F.C.C. 511.

The Commission, in awarding the grant to Wilson, found that Wilson enjoyed the "status of a licensee seeking renewal of its license in competition with others seeking the same facilities, albeit occupying a less favorable position than that which one seeking renewal normally holds." 37 F.C.C. at 515. It found all of the applicants "pre-eminently qualified" to operate a television station on Channel 10 in Miami, but found Wilson comparatively superior to the others. The Commission summarized its choice of Wilson as the most qualified under its comparative criteria because "it has achieved a combination of factors in no way approached by any other applicant. Majority stockholders having local residence, local civic association, and many years of broadcast experience would be integrated on a full-time basis," as well as assurance drawn from "its past broadcast record." *Id.* at 523. Chairman Henry, dissenting in favor of petitioner, found that unlike the petitioner's situation the local residence of the Wilson principals was "of an exceedingly recent vintage" and their interest in the area "has always depended upon the possibility that they might operate the very television station here in question." *Id.* at 532-33. Regarding Wilson's past broadcast record, Chairman Henry noted that it was being compiled during a period when the applicant was practically certain that it would be involved in a forthcoming comparative hearing. Under such circumstances,

Chairman Henry could not "accord the Wilson record even the slight significance which the majority strains to afford it." *Id.* at 533.

A majority of the Court of Appeals (see Appendix A, *infra.*), in affirming the Commission's award to Wilson, found no error in the fact Wilson was accorded the status of a licensee with "a less favorable position than a normal licensee. . . ." The Court held that the Commission's resolution of the various comparative issues represented a reasoned and reasonable judgment. To the contrary, however, Judge Wright, in dissent, stated that in according Wilson any favored status, the Commission violated Section 301 of the Communications Act of 1934, 48 Stat. 1081, 47 U.S.C., Section 301, which provides that no license granted by the Commission "shall be construed to grant any right, beyond the terms, conditions and periods of the license." Judge Wright stated that the effect of the choice of Wilson over the new applicants, and similar holdings which give a preferential position to the license holder, "has been to make renewal of licenses almost automatic. . . ." The dissent would remand the case for reconsideration without any preference whatever to Wilson.

REASONS FOR GRANTING THE WRIT

Presented to the Court by this petition is an example of the consistent practice of the Federal Communications Commission to favor an incumbent licensee seeking a renewal of its license in a hearing with other applicants competing for the same facility. Both the example and the practice are accentuated by the facts of this case in that the "licensee" involved had been awarded essentially a temporary operating authority

to continue an existing television service pending the outcome of a comparative proceeding to determine the best qualified applicant to operate the facility in the public interest. Condonation of this practice by a divided Court of Appeals in this case is submitted as contrary to the provisions of the applicable Federal statute and violative of principles enunciated in decisions of this Court. A writ of certiorari should issue not only to correct these errors, but, more importantly, to settle paramount and recurring questions of Federal law which transcend this case and vitally affect the entire field of broadcasting.

1. The court below erred in condoning a practice of the Federal Communications Commission which violates the Communications Act.

The Commission's practice in renewing licenses is clear; indeed, it has asserted in this case that its position is to give a favored position to "one seeking renewal," 37 F.C.C. at 515. The Commission admits that "any grant [of a license] *necessarily* places the grantee in an advantageous position vis-a-vis those who seek facilities upon expiration of his license term." *Id.* at 514 (emphasis added).

The generality of this practice is clearly reflected in the Commission's Public Notice of July 28, 1965 (see Appendix D, *infra*), relative to comparative hearing criteria, wherein the fact of a satisfactory (as distinguished from an outstanding or unsatisfactory) broadcast record is announced as having little or no decisional significance in a comparative proceeding. *Policy Statement on Comparative Broadcast Hearings*, 5 Pike & Fischer Radio Reg. 2d 1901, 1912 (1965). Interestingly, the Commission's statement excepts from the enunciated comparative criteria cases involving "a li-

censee seeking renewal of its license." *Id.* at 1907 n. 1. Categorically rejecting the concept that incumbent licensees may legally be accorded a distinctive and preferred status, Commissioner Hyde, in dissenting from the policy statement, said:

> "I do not believe that the Commission has given sufficient thought to the consequences of establishing the order and weight of preferences in comparative hearing cases. The document says that the policy is to apply to 'new' applicants, and that it 'does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license'. I do not believe that a logical or a legal basis can be established for making a distinction between criteria to be applied to renewal applications and criteria applicable to initial applications. The statutory test is exactly the same. The intention of Congress to require the same test was affirmed in the Communications Act Amendments of 1952. . . ." *Id.* at 1917.

The existence of the practice favoring incumbent licensees and the questionable legality thereof could not be more clearly drawn.

The genesis of the Commission's practice is found not in the laws by which it regulates and to which it is subject; it is found rather in what might be termed a private doctrine of administrative equity which it has created. The distillate of the equities embraced by this doctrine is a recognition that large investments are made in broadcasting facilities and that if a licensee believed his investment would be endangered at renewal by a truly comparative hearing, it is not likely that large investments would be made. See *Evangelical Lutheran Synod* v. *FCC*, 70 App. D.C. 270, 272, 105 F. 2d 793, 795 (1939);

Yankee Network v. *FCC*, 71 App. D.C. 11, 107 F. 2d 212 (1939); *Churchill Tabernacle* v. *FCC*, 81 U.S. App. D.C. 411, 414, 160 F. 2d 244, 247 (1947); *L. B. Wilson, Inc.* v. *FCC*, 83 U.S. App. D.C. 176, 180, 170 F. 2d 793, 797 (1948); see also Warner, *Radio and Television Law* 720 (1949); "Broadcast Regulations and Intermedium Competition," 45 Va. L. Rev. 1104, 1127 (1959); and "Competition or Control II: Radio and Television Broadcasting," 107 U. of Pa. L. Rev. 585, 591 (1959).

Frequently, as in this case, the Commission observes that no decisive weight is given such equities, but "ordinary human experience tells us that these factors have a force which cannot always be set aside by the triers, no matter how sincere their effort or intent," *Community Broadcasting Co.* v. *FCC*, 107 U.S. App. D.C. 95, 101, 274 F. 2d 753, 759 (1960), and, as Judge Wright recognized in his dissent, the "result of the Commission's practice giving the license holder a preference has been to make renewal of licenses almost automatic." See Appendix A, *infra*. This practice, in effect, gives the licensee a perpetual equity of enfranchisement.[2] The recognition of these "equities"

---

[2] The Commission's *Annual Report for Fiscal Year 1964* shows that in that year the Commission examined 1,809 applications of AM, FM and TV stations for renewal of licenses. Within that period the Commission refused renewals to only three licensees (Report, p. 53), all of which were found guilty of improper conduct. Only four renewal applications were the subject of hearings along with competing mutually-exclusive applications (Report, p. 54), and of those four proceedings set for comparative hearings, three resulted in renewals for the incumbent (see *Sunbeam Television Corp.*, 38 F.C.C. 805 (1965); *Charles County Broadcasting, Inc.*, 4 Pike & Fischer Radio Reg. 2d 196 (1965); and the instant case), and the fourth proceeding is still pending before the Commission (*WHDH, Inc.*, FCC Docket No. 15204, et al).

is particularly anomalous in the present case since each of the new applicants stated on the record that if it were successful in obtaining a grant it would be willing to purchase the transmitter building, tower, antenna and other equipment of L. B. Wilson, Inc., at a fair market price, or, in case of dispute, would accept an arbitrated price for such facilities. See 37 F.C.C. at 543 (Initial Decision).

This practice of favoring an incumbent seeking renewal of its license in competition with others is patently contrary to the requisites of the Communications Act of 1934, as amended. Such a practice ignores the prohibitions of Section 301, wherein the Congress has expressly provided for the use of broadcasting channels, "but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and *no such license is to be construed to create any right beyond the terms, conditions, and periods of the license.*" (Emphasis added.) Likewise, Sections 304 and 309(h) are being violated, for Section 304 requires as a condition precedent to any grant the signing of "a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise," and Section 309(h) specifies that the license *per se* is to contain the stated condition prohibiting the vesting of any right in the licensee beyond the terms of the license.

Moreover, favoring an incumbent is contrary to the Congressional mandate of Sections 307(a) and (d) of the Communications Act which require the Commission to grant licenses only in the "public interest, convenience and necessity." In the renewal context, the

Commission appears to deem the public interest standard as met by compliance with minimum technical, legal and financial screening requirements. That this is not the renewal standard contemplated by the Congress, in that the *same* standard is prescribed for both new applications and license-renewal applications, is documented by the legislative history of the 1952 amendment of Section 307(d). See Communications Act Amendments, 1952; Senate Report No. 44, 82d Cong. 1st Sess. (Jan. 25, 1951), and House Report No. 1750, 82d Cong., 2d Sess. (April 8, 1952)—to accompany S. 658.

The manner in which the Commission's uniform practice of favoring the incumbent was applied in the instant case is readily observable from the Commission's decision. The simple fact is that the qualifications of respondent L. B. Wilson, Inc., the temporary incumbent, which the Commission found to be decisive in its favor, were qualifications which it acquired only by virtue of the temporary operation. None of the stockholders of the incumbent licensee were residents of Miami prior to the temporary grant; none of them had participated in civic affairs in that community before that time; and none had any experience whatsoever in the operation of a television station. See 37 F.C.C. at 544-46 (Initial Decision). In contrast, all of the stockholders of petitioner were long-term residents of Miami, with established records of active civic participation apart from any interest in television; and three of the four stockholders had extensive television operational experience. See 37 F.C.C. at 556-60, 593 (Initial Decision). Nevertheless, the Commission preferred the short-term licensee by the process of putting on the scale the residence, civic participation, and tele-

vision experience of its stockholders which they acquired subsequent to the time that they received the four-month grant and which they would not have obtained except for the fact that they were incumbents of the channel. See 37 F.C.C. at 516, 517-19, 521-22.

The court below, in affirming the Commission's action, took the Commission at its word that the credit given to the incumbent licensee in the comparative category of past broadcasting performance due to its record in Miami was "minor in nature" (37 F.C.C. at 522) and was not directly considered in evaluating that applicant vis-a-vis the other applicants under other comparative categories. It is significant, however, that in finding the incumbent superior to petitioner in the critical factor of broadcast *experience* of its principals —as distinguished from broadcast *record*—the Commission emphasized the activities of the former's stockholders in the "operation of a television station in the Miami area," (37 F.C.C. at 518) notwithstanding the undisputed fact that their only experience in Miami or, indeed, anywhere else, was derived solely in connection with Channel 10. Moreover, in awarding credit for this experience, the Commission did not confine itself even to operations during the four-month period of its temporary grant. One of the major stockholders was credited with experience in the post of general manager of the Miami station (*ibid.*) even though he did not assume this post until after the end of the four-month period (see 37 F.C.C. at 545 (Initial Decision), R. 1-2 in Joint Appendix to briefs in court below).

The fact that the qualities upon which the Commission relied in finding for respondent L. B. Wilson, Inc. were attributable to incumbency *per se* was found by

the Court of Appeals not to be "an *unfair* advantage by virtue of being a license renewal applicant" (emphasis added). It is submitted, however, that an advantage ascribed to such circumstances is both unfair and unlawful in that such a favored position is prohibited by the Communications Act, and the decisions of this Court.

2. The decision of the Court below is in conflict with principles enunciated by this Court.

This Court has stated:

> "The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed. Thus *the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public.*" *FCC* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 475 (1940). (Emphasis added.)

The *Sanders* case stands for the principle, equally applicable here, that the purpose of the Communications Act is the protection of the public interest and not any private interest or equity of the broadcaster. More specifically, *Sanders* held that economic injury to an existing broadcaster is not to be considered independently by the Commission in granting or withholding a license to another broadcaster, *id.* at 476. This follows from the fact that "the Act recognizes that the field of broadcasting is one of free competition," *id.* at 474, and that, were it not so, Congress would have granted the Commission powers of control over rates, programs and other activities of the broadcasting business, *id.* at 476.

In the case at bar—and in license renewal cases in general—the Commission has ignored the Act's policy that there should be free competition for frequencies and that any injury to a previous licensee resulting therefrom is not, as such, to be considered by the Commission. The Commission's practice "apparently is responsible for the private sales of television stations in urban areas running into millions of dollars. * * * If the Commission would make clear, as the Congress has, that a licensee has no further rights beyond the term of its license, here would be no certainty that these public grants would continue to go to the prior license holder." Wright, J., dissenting below, Appendix A, *infra*.

This Court has also stated that the public interest, convenience and necessity standard of Sections 307(a) and (d) and 309(a) of the Act (see Appendix C, *infra*) require the selection of the applicant who, in the Commission's judgment, will *best* perform in the public interest. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 n. 2 (1940). Therefore, the Commission cannot justify a preference which is based in fact on protecting private investments as being for the public interest, convenience and necessity.

The lower court's disregard for the principles enunciated by this Court was noted by Judge Wright (see Appendix A, *infra*) when he observed that the practice of favoring an incumbent in a comparative proceeding is to make a mockery of the form of hearing required by the *Ashbacker* case, i.e., "Where two bona fide applicants are mutually exclusive the grant of one without hearing to both deprives the loser of the opportunity which Congress chose to give him," *Ashbacker*

Radio Corp. v. *FCC*, 326 U.S. 327, 333 (1945). In short, the hearing given petitioner in this case—and other applicants in renewal cases—is an "empty thing" (*id.* at 338) as petitioner has not been given the "truly comparative consideration," *Community Broadcasting Co.* v. *FCC*, 107 U.S. App. D.C. 95, 100, 274 F. 2d 753, 758 (1960), to which it is entitled.

3. The court below has affirmed a decision of the Federal Communications Commission wherein the elementary right to a fair and impartial hearing was denied.

Apart from the larger question of whether a broadcast licensee is entitled to any preference at license renewal time by reason of incumbency, this case under its facts presents a peculiarly aggravated aspect of the question which renders the judgment below a gross denial of due process.

The license here involved, it is to be recalled, was not for the normal three-year term according the licensee a degree of unilateral exclusivity in operation for such term. Indeed, the so-called "license" (essentially a temporary interim operating authority)[3] was awarded for only four months for the purpose of continuing an existing television service pending the filing of competing applications, in order that the applicant best qualified to operate in the public interest might be determined. Following a lengthy hearing, petitioner was overwhelmingly preferred by the hearing

[3] The Court of Appeals construed the operating authority as follows: "It [the Commission] awarded the permit to the sole remaining qualified applicant, L. B. Wilson, Inc., but upon certain conditions and with restrictions, which in effect made the permit a temporary authority." *Public Service Television, Inc.* v. *FCC*, 115 U.S. App. D.C. 200, 200-01, 317 F. 2d 900, 900-01 (1962).

examiner on the basis of its superior comparative qualifications. In reversing the hearing examiner, the Commission relied virtually exclusively upon attributes of respondent L. B. Wilson, Inc., which were gained as an incident of and were attributable to its temporary operation of the facility leading to and during the pendency of the comparative hearing.

Can it be said that petitioner has been accorded a fair and impartial hearing if its superior comparative qualifications are to be vitiated and overcome by qualifications of a competitor acquired as an incident of the passage of time occasioned by the hearing itself? The generation of superior qualifications by a process of chronological accretion related to the time required for the hearing cannot be squared, it is submitted, with due process of law.

Applicants with outstanding qualifications are impelled to seek broadcast facilities in the belief that the merit of their cause will be judged and vindicated in a hearing process that is fair. That such should be the case is distinctly in the public interest to insure that those best qualified do in fact seek broadcast facilities. *Can it be assumed, however, that petitioner, upon being effectively invited by the Commission to seek the facility involved pursuant to a hearing in which its comparative qualifications would be evaluated, would have filed therefor had it thought for a single moment that its competitor, who was temporarily operating the facility during the course of the hearing to determine the best qualified applicant, would acquire its "qualifications" as an incident of its concomitant operation of the facility?* To state the negative is to state the self-evident. The record of this case supports the categorical assertion that respondent L. B. Wilson, Inc.,

possessed no qualifications approaching those of petitioner apart from asserted qualifications acquired *after* its grant of temporary interim operating authority, denominated a "four-months license."

Inherent in the disturbing anomaly presented by this case is its incompatibility with the otherwise zealous manner in which the court below has sought to insure that a grantee of temporary operating authority pending the resolution of a comparative hearing shall acquire *no* comparative advantage by reason of the interim operation. *Community Broadcasting Co.* v. *FCC,* 107 U.S. App. D.C. 95, 101, 274 F. 2d 753, 759 (1960). That so contrary a result has been occasioned and condoned in the instant case is at once unexplained and inexplicable.

4. The question presented is of fundamental importance to the administration of the Communications Act and to the public which is the Act's beneficiary.

The preservation of competition in broadcasting and the requirement that broadcast facilities shall be granted solely by reference to the *public* interest are basic touchstones of the Communications Act. Neither purpose is served by a preferential policy favoring incumbent licensees.

The importance of settling the question presented by this petition is magnified in reflection of the fact that the choice broadcast channels are now occupied while the remaining allocations permitted by spectrum limitations are being rapidly assigned, all conspiring to a progressive diminution in any availabilities for newcomers irrespective of their outstanding qualifications. Manifestly, this increasingly means that in the future the only hope for significant and

meaningful improvement in the caliber of broadcast licensees will be limited to the occasion of license renewals (and of sale, to a lesser degree). Such improvement is unlikely, to say the least, if the established position of the existing broadcaster is circumscribed and insulated by a preferential status at license-renewal time.

The statutory restriction of broadcast licenses to limited periods evinces a settled Congressional purpose to obviate any possibility of established interests preempting the airways of the public domain and to insure a periodic reassessment of the stewardship and qualifications of those aspiring to a public trust. Implicit in the review and evaluation of license-renewal applications is the one meaningful and conclusive control to insure that broadcasters shall serve the public interest, to avoid the concentration of media interests, to deter monopolistic tendencies, and most significantly to accord the opportunity to those better qualified to succeed to and assume licensee responsibility. This Congressional policy is thwarted by a demonstrable practice of the Federal Communications Commission to prefer existing licensees at license-renewal time over competitors for the broadcast facilities involved. The result has been, on the one hand, self-satisfaction on the part of the existing broadcaster that his license will most assuredly be renewed and, on the other, a deterring of preeminently qualified entities to seek a facility in the almost certain knowledge that such effort would be futile. Neither result is in the public interest. This case affords the Court a signal opportunity, which it is urged that it embrace, to insure that the Congressional policy evinced in the Communications Act is implemented and not aborted by an "easy" adminis-

trative practice born of overriding concern for the personal financial interest of the broadcaster to the detriment of the public interest. The entire face of broadcasting can be altered thereby to the public good.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SCOTT W. LUCAS
JOSEPH B. FRIEDMAN
1028 Connecticut Ave., N. W.
Washington, D. C. 20036
Attorneys for Petitioner
South Florida Television
Corporation

October 5, 1965

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18873

SOUTH FLORIDA TELEVISION CORPORATION, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

L. B. WILSON, INC., INTERVENOR

No. 18880

MIAMI TELEVISION CORPORATION, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

L. B. WILSON, INC., INTERVENOR

On Appeals from a Decision of the
Federal Communications Commission

Decided July 8, 1965

• • •

Before EDGERTON, *Senior Circuit Judge*, and FAHY and WRIGHT, *Circuit Judges*.

PER CURIAM: These appeals challenge the validity of a final decision and order of the Federal Communications Commission, adopted July 29, 1964, denying the applications of appellants South Florida Television Corporation, Civic Television, Inc.,[1] and Miami Television Corporation

---

[1] Civic's appeal was dismissed on its own motion.

for permits to construct a new television station to be operated on Channel 10 in Miami, Florida, and granting the competing application of intervenor L. B. Wilson, Inc. For prior judicial history of the controversy over Channel 10 at Miami, begun before the Commission in 1953, see our decisions in *WKAT, Inc.* v. *Federal Communications Comm'n*, 103 U.S. App. D.C. 324, 258 F.2d 418, and in *WKAT, Inc.* v. *Federal Communications Comm'n*, 111 U.S. App. D.C. 253, 296 F.2d 375, *cert. denied sub nom, Public Service Television, Inc.* v. *Federal Communications Comm'n*, 368 U.S. 841.

In the proceedings now before us, after these decisions of our court, only Wilson survived as a qualified applicant. On October 19, 1961, the Commission authorized Wilson to begin operations on November 20, 1961, thereafter directing it, however, to file application for renewal of its license within four months from November 20, 1961. Other applications for Channel 10 were required to be filed by May 21, 1962. Appellants filed their applications within that time.

As a result of a comparative hearing on the four applications the hearing examiner on December 23, 1963, decided in favor of South Florida. The Commission in due course reversed, and granted the application of Wilson. This decision, rendered July 29, 1964, is now before us. We affirm.

A principal contention of appellants is that the Commission, unlike the hearing examiner, erred in considering Wilson as having the status of a licensee seeking renewal, though its license, as indicated above, was for only four months. It is said Wilson should have been considered only as a temporary operator and treated on a basis of equality with appellants, no favorable consideration being given to it by reason of its previous operation of the channel. Though Wilson was accorded the status of a

licensee[2] it was held to occupy a less favorable position than a normal licensee because, as stated by the Commission, of "(a) the limited period afforded under and the nature of the authorization granted, and (b) the aforeknowledge of L. B. Wilson, Inc., of the probability it would be faced with a comparative hearing at the end of its 4-month term."

Other principal contentions of appellants are that, due in part to an unfair advantage allegedly given to Wilson as a licensee, the Commission erred in finding Wilson (1) superior in respect of broadcast experience, (2) superior in integration of ownership with management, and in finding (3) practical equality among the applicants in respect of area familiarity. Due to these asserted errors, and the superiority of appellants in other relevant respects, it is urged the decision in favor of Wilson cannot stand.

The credit given to Wilson in the comparative category of past broadcasting performance due to its record of performance, the Commission stated, was "minor in nature," and such record was not directly considered in any of the three comparative categories above enumerated and characterized as erroneous by appellants. In none of these categories was Wilson given an unfair advantage by virtue of being a license renewal applicant.

Though we might have reached a different result—this we need not decide—we conclude that the findings of the Commission, and its decision resting thereon, were reached validly. All factors essential to decision were considered and compared.[3] With sufficient factual support all issues were resolved in a manner which disables the court from

---

[2] We do not read our decision in the second *WKAT* case as holding this to have been improper.

[3] In its Supplemental Brief filed with us the Commission states that it "has consistently taken the position that 'over-commercialization' is inconsistent with the public interest."

putting aside the award to Wilson. It was the result of a reasoned and reasonable judgment of the agency charged with primary responsibility in the matter.

Affirmed.

WRIGHT, *Circuit Judge, dissenting:* In granting intervenor's application after the comparative hearing, the Commission held that intervenor had the status "of a licensee seeking renewal of its license * * * albeit occupying a less favorable position than that which one seeking renewal normally holds." 37 F.C.C. at 515. In so holding, the Commission, in my judgment, violated Section 301 of the Communications Act of 1934, 48 STAT. 1081, 47 U.S.C. § 301, which provides that no license granted by the Commission "shall be construed to create any right, beyond the terms, conditions, and periods of the license."

The right to operate a television station is a public right granted by the Commission, as a representative of the public, to a private applicant, free of charge. To make certain that the licenses granted by the Commission would become equally available to other applicants every three years, Congress made clear that the grant of a license would not prejudice new applicants in their effort to participate in the public largesse. The effect of the Commission's ruling here, and its prior rulings[1] giving a preferential position to license holders, is in derogation of the congressional command and apparently is responsible for the private sales of television stations in urban areas running into millions of dollars. Servicing this kind of investment requires substantial advertising revenues. If the Commission would make clear, as the Congress has, that a licensee has no further rights beyond the term of its license, there would be no certainty that these public grants would continue to go to the prior li-

---

[1] See, *e.g.*, *Wabash Valley Broadcasting Corporation*, 1 Pike & Fischer R.R. 2d 573 (1963); *Hearst Radio, Inc.*, 6 Pike & Fischer R.R. 994 (1951).

cense holder. The result of the Commission's practice giving the license holder a preference has been to make renewal of licenses almost automatic, in spite of the fact that a form of comparative hearing as required by *Ashbacker*[2] is indulged.

I would remand this case for reconsideration, without any preference whatever to intervenor.

One further matter perhaps is worth noting. After argument, the court requested briefs from all parties, including the Commission, directed toward answering the following questions:

1. Is the amount of TV time actually used in stating, singing, or otherwise showing commercials a public interest consideration?
2. If so, should the Commission be required to consider the length and number of commercials proposed by the competing applicants in this case?
3. Is the audio volume of the commercials vis-a-vis the other part of the program a public interest consideration?
4. If so, should the Commission be required to consider proposals made by the competing applicants in this case with respect to audio volume?

The briefs filed pursuant to the court's order are indeed interesting. The competing parties stopped their internecine warfare and joined hands with the Commission in opposing the court's authority to raise the issue of advertising, loud or otherwise. The reason for the solidarity on this issue is of course, obvious. But perhaps it is not too much to hope that in some future proceeding one of the parties, or even the Commission itself, will perceive the possibility that the public may have some interest, adverse though it may be, in the length and loudness of commercials.

---

[2] *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327 (1945).

APPENDIX B

[37 F.C.C. 511]*

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

In re Applications of L. B. WILSON, INC., MIAMI, FLA. For Renewal of License of Television Station WLBW-TV (Including TV STL Station KIS-77 and TV Pickup Station KE-7759)	Docket No. 14775 File No. BRCT-509
CIVIC TELEVISION, INC., MIAMI, FLA.	Docket No. 14776 File No. BPCT-3041
SOUTH FLORIDA TELEVISION CORP., MIAMI, FLA.	Docket No. 14777 File No. BPCT-3042
MIAMI TELEVISION CORP., MIAMI, FLA. For Construction Permits for New Television Broadcast Stations (Channel 10)	Docket No. 14778 File No. BPCT-3044

* * *

DECISION

(Adopted July 29, 1964)

BY THE COMMISSION: CHAIRMAN HENRY DISSENTING AND ISSUING A STATEMENT; COMMISSIONERS BARTLEY AND COX NOT PARTICIPATING.

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of L. B. Wilson, Inc., for renewal of license of station WLBW-TV, Miami, Fla., and associated stations and the applications of Civic Television, [512] Inc., of South Florida Television Corp., and of Miami Television Corp.

---

* The bracketed boldface numbers appearing hereafter in this appendix refer to succeeding pages of this decision in the Federal Communications Commission Reports.

for construction permits for a new commercial television station to operate on channel 10 at Miami, Fla. The initial decision of Hearing Examiner H. Gifford Irion released December 27, 1963 (FCC 63D–147), proposes a grant of the South Florida Television Corp. application and denial of the remaining applications. Exceptions to the initial decision were filed by each of the applicants and by the Commission's Broadcast Bureau. Oral argument on the exception was held before the Commission, en banc, on June 5, 1964.

2. The findings of fact in the initial decision have been reviewed in the light of the record evidence and the exceptions filed and, subject to the modification set forth in appendix A, such findings are adopted. The conclusions of the examiner and his ultimate conclusion to grant the application of South Florida Television Corp. have likewise been reviewed in the light of the record evidence and exceptions. The conclusions are modified to the extent reflected herein and in appendix A, and except as modified, are adopted.[1]

3. Exceptions are taken to the failure of the hearing examiner to disqualify or to impose comparative demerit

---

[1] Each of the applicants filed very extensive exceptions: 121 pages and 135 exceptions by Wilson, 122 pages and 128 exceptions by Civic, 53 pages and 121 exceptions by South Florida, 97 pages and 218 exceptions by Miami Television. Each exception has been carefully considered and ruled on, the rulings appearing in app. B to this decision. By exceptions to conclusions, each of the applicants urges it has demonstrated overall superiority under the comparative criteria, and in most instances urges superiority in each factor. Our conclusions are founded upon the evidence of record and, accordingly, these exceptions have been granted only to the extent that they are supported by the evidence. As is apparent, in the greater number of instances the exceptions require outright denial for lack of record support. Where appropriate, we have made specific reference in our rulings to the paragraphs of the decision wherein the subject matter of the exception is covered, such paragraphs fully covering the bases of our rulings.

against L. B. Wilson involving alleged failure to make required filings with the Commission, alleged violations of State election laws by two principals, the association of Mr. Sol Taishoff in the corporation, and the veracity of information contained in a balance sheet filed with the Commission. Similar exceptions are taken going to principals of South Florida involving a traffic law violation and the valuation of a business interest held by one of its principals. Exceptions are also taken to the failure to assess demerit against Miami Television on the basis of representations made before the Securities Exchange Commission in the organization of this corporate entity. The examiner's findings of fact accurately and adequately set forth the record evidence relative to each of these matters and we agree with his conclusions that in no instance are there grounds for disqualification or comparative demerit. The exceptions in these areas will accordingly be denied.

4. Exceptions are taken to (*a*) grant of petitions to amend, and acceptance by the examiner in two instances of amendments to the financial showing of South Florida; (*b*) to the action of the Review Board sustaining, upon appeal, one of these actions; (*c*) to the ruling of the Review Board denying the petition of L.B. Wilson, Inc., for enlargement of issues to place in issue the structural feasibility of the towers proposed by Civic and Miami Television, the availability of the transmitter sites specified by South Florida, and the nature of the program service from other television stations serving Miami, Fla.; and (*d*) to the refusal of the examiner and of the Review Board to [513] hold that under the terms of the loan agreement of South Florida's alternative financial proposal, the First National Bank of Boston would become a principal in South Florida. For the reasons given in each instance by the ruling party, these rulings are affirmed and the exceptions thereto will be denied. The examiner's findings of fact accurately and adequately set forth the record evidence relative to the financial qualifications of Civic Television,

Inc., and of South Florida Television Corp. The exceptions to these findings will accordingly be denied.

5. The ruling of the examiner establishing September 12, 1962, as the cutoff date for the showing of community contacts is also affirmed, and the exceptions thereto will be denied. This was a reasonable exercise of the examiner's function of controlling the course of the hearing. The date selected conformed with the date agreed to by all counsel that the proposed programing would be frozen, this date also being the date of adoption of the order of designation herein. The ruling was applicable to all applicants, and contacts made thereafter, under the agreement, could not have entered into development of the programing proposals. (See *Seven Locks Broadcasting Company, et al.*, FCC 64–595, released July 6, 1964.) The ruling permitting an evidentiary showing of the integration of Edward E. Lewis of Civic Television is also affirmed, the alleged grounds of variance not being present. Nor do the asserted evidentiary facts provide a basis for the requested conclusion that Mr. Lewis was lacking in candor. These exceptions will, therefore, also be denied.

Status of L. B. Wilson as an Applicant

6. The examiner accurately sets forth a historical résumé of the comparative hearing and ensuing litigation resulting in grant of a construction permit and short-term license to L. B. Wilson, and it is adopted. He has not, however, correctly characterized the authorization granted. The authorization granted, as noted by the examiner, was subject to no conditions nor limitations other than that a renewal of license application would be called for after a 4-month period of operation. The nature of the authorization given was thereafter made clear both by order and by our briefs filed in the court proceedings. Our order of October 5, 1960 (29 FCC 862), stated as follows:

> Our ruling in this matter has been deferred thus far lest we had been confronted with a situation in which

the four original applicants were all found disqualified. In such case, channel 10 would have been completely vacated and opening the competition to all comers would have been necessary and proper. Such not being the case, as we are left with a qualified applicant, we cannot admit new applicants without derogating from the rights of L. B. Wilson, Inc., and we neither find nor has petitioner demonstrated that the public interest requires the exercise of our discretion.

In our briefs filed in *WKAT, Inc.* v. *FCC*, cases Nos. 13718, 14021, 14170, in the U.S. Court of Appeals for the District of Columbia Circuit, we stated as follows:

The Commission recognized, however, that the comparative proceedings before it had, to some degree, failed in their purpose of producing the best qualified licensee and that "the peculiar circumstances of this matter have resulted in a type of award by default." Accordingly, it limited the license [514] period under the permit granted to a period of 4 months subsequent to construction "rather than * * * the 3-year period which has been customary."

* * * * * * * * *

The grant to Wilson was no more ex parte than any other grant made in the presence of only one qualified applicant. Indeed, it was much less so, since the Commission had before it the original comparative record (on the basis of which one Commissioner had thought Wilson best qualified of the four, even giving consideration to the death of L. B. Wilson, Sr. * * *) and the record in the hearings pursuant to remand, which—in the Commission's view—showed that Wilson alone had abstained from the improper activities engaged in by its competitors.

* * * * * * * * *

And any grant necessarily places the grantee in an advantageous position vis-a-vis those who seek his facilities upon expiration of his license term.

* * * * * * * * *

* * * the purpose for which the proceeding was instituted—viz, to make a comparative selection among

> qualified applicants—has been frustrated. The Commission, as we have noted, recognized this fact and hence provided for early reexamination of its grantee, Wilson, and an early opportunity for comparison of Wilson's qualifications with those of any other person who desires to apply. Unlike Roberts, it was not persuaded that the public interest in encouraging new applicants and minimizing any practical disadvantages which such applicants may face required something more than the 4-month limitation which it imposed on Wilson's license rights.

The court had before it the Commission's orders and all the various contentions and assertions of the Commission and the parties as to the status of L. B. Wilson, Inc., as a consequence of the 4-month grant. The court ruled as follows:

> One of the original applicants, L. B. Wilson, Inc., was not involved in irregular activities. It was found qualified by the Commission, and the Commission directed that its application be granted, subject to the proviso that any license issued upon completion of the construction be for 4 months and no longer. This latter action by the Commission was for the purpose of resolving a difficult practical problem. The operator who was on the air was one of the applicants found unqualified; but a license to L. B. Wilson, Inc., for a full term without comparative consideration with any new applicants, would give Wilson a measure of advantage which, in view of all the surrounding circumstances, was deemed by the Commission to be unwise. We think the decision reached by the Commission was within its authority and was a reasonable one. It was seeking to sustain the public interest in respect to continuing television service to the viewing public in the Miami area. Closing the station entirely was an alternative not required in the circumstances.
>
> • • • • • • • • • •
>
> It is our understanding that the Commission contemplates consideration of other applications for the station, if any are offered, when the matter of a full-term license comes before it, and it will then follow

whatever proceedings are appropriate under the circumstances at that time. Its decision then will, of course, be subject to review here upon appeal.

7. The Commission did call for the renewal of license application submitted herein by L. B. Wilson, Inc., as of the end of the 4-month period subsequent to commencement of operation of station WLBW–TV. By this direction a special composite week was specified to afford the full scrutiny under which any application for renewal of a broadcast station license is placed. By this order we also in effect deferred consideration of the renewal application for a 60-day period during which, consistent with our previously expressed intent, competing [515] applications could be filed. Contrary to the determination of the examiner, the status of L. B. Wilson, Inc., herein is, therefore, that of a licensee seeking renewal of its license in competition with others seeking the same facilities, albeit occupying a less favorable position than that which one seeking renewal normally holds. This less-favorable position arises from (*a*) the limited period afforded under and the nature of the authorization granted, and (*b*) the aforeknowledge of L. B. Wilson, Inc., of the probability it would be faced with a comparative hearing at the end of its 4-month term.

8. It follows, therefore, that the rulings of the examiner precluding L. B. Wilson, Inc., from including in its supplemental showing its record of performance for the entire period of its stewardship, both in limitation of the period of time and in excluding the evidence re promise versus performance, were also in error. It is the composite-week showing of a licensee, however, to which the Commission attaches the greatest significance rather than to what is termed a "supplemental" showing. This is for the reason that the composite week is selected and designated by the Commission after expiration of the dates making up such week. Thus an applicant cannot intentionally tailor its programing for the purpose of enhancing its record of performance. Nor can an applicant pick and choose from

its programing that which it considers most favorable to its cause as may be done in the compilation of a supplemental showing. (See *Brush-Moore Newspapers, Inc.*, 11 R.R. 640, 695.) Though some weight does attach to such supplemental showings, it is in any proceeding of lesser significance. As asserted by Wilson in its brief in support of exceptions, the Commission did in *Wabash Valley Broadcasting Corporation*, 1 R.R. 2d, 573, credit a showing by an applicant of past performance for a week selected by that applicant. In that proceeding, however, no other showing was presented. And, as forenoted and also weighed in the conclusions hereinafter reached, the entire record of station WLBW–TV was compiled under a permit which is best described by terminology found in the oral argument on exceptions as a "searchlight" or "shotgun" permit. For those reasons, and in view of our ultimate disposition of this proceeding, we deem these rulings to have been unprejudicial error. The examiner correctly rejected the proffered evidence of the expenditures by L. B. Wilson, Inc., in the construction and operation of station WLBW–TV, but for the reason that such evidence is immaterial as related to the statutory standard of the public interest under which this proceeding must be decided.

COMPARATIVE CRITERIA

9. We agree with the examiner that the record fully supports the conclusion "that each one of these applicants is preeminently qualified to operate a television station on channel 10 in Miami." As is apparent from paragraph 3, supra, we also agree with his conclusion that "Despite their vigorous and ofttimes strained efforts to traduce one another, they and their principals have emerged without significant blemish and the Miami public is indeed fortunate to be assured of a future licensee possessing high qualities of character and ability." We also agree with his conclusions that no applicant merits a preference [516] in the comparative areas of programing, policies, or in staff,

studies, and equipment. The proposals of the applicants in the foregoing areas of comparison, all record evidence thereto, and the claims to preferences in one or more areas have been carefully examined and evaluated, but we find no basis to modify the examiner's conclusions with respect thereto. We are also in agreement with his conclusions that Civil Television, Inc., and South Florida Television Corp. have established on the record their financial qualifications.

Area Familiarity

10. *Local residence.*—As noted by the examiner in his weighing of this factor, local residents own legally and beneficially 99.6 percent of the stock of Civic, 100 percent of the stock of South Florida, 84.28 percent of the stock of Miami Television, and 51.8 percent of the stock of Wilson. These same local residents of Wilson exercise voting control, as two of three voting trustees, over an additional 18.98 percent stock interest, a fact not detailed by the examiner. We are in agreement with the conclusions of the examiner that Civic, South Florida, and Miami Television are so nearly equal that a preference to any one is not justified in this comparative factor except to add to the examiner's judgment of "The three stand ahead of Wilson" that the preference resting on this percentage difference is necessarily slight, a large majority of each applicant's stock being locally controlled.

11. *Civic participation.*—With respect to civic participation of principals, we are also in agreement with the conclusions of the examiner other than that South Florida warrants a preference over Wilson in this comparison and, in connection with Mr. MacDonald's activities, the judgment that "the evidence of his financial contributions certainly speaks well of him, since humanity is normally less inclined toward giving money than giving time" to civic and charitable organizations. It is the belief of the Commission that the experience of such organizations is to the contrary.

Equally essential to the successful performance of the public functions of these groups, however, are the services of the associated individuals both in carrying out the functions of the organization and the acquisition of funds required for carrying out such functions. Mr. MacDonald's fund-raising activities are not limited to that of a contributor, a nominal facet. Rather the activities credited, as reflected by the findings of the examiner as modified herein, are for his continuing membership in groups having this responsibility and the time and effort devoted in the sponsorship of events designed to raise funds for civic organizations in addition to personal contributions and continuing participation. Additional findings have been made of both Mr. MacDonald's and Mr. Topmiller's active civic participation. Giving full consideration to the entire showings of both Wilson and South Florida, we find no differences of significance with those of both being inferior to those of Civic and Miami Television. Between the latter two applicants, we follow the examiner in according a preference to Miami Television.

12. *Diversity of business backgrounds.*—Civic and Miami Television show a wide diversity of local business interests among their [517]various stockholders arising, as noted by the examiner, largely out of the number of such stockholders. Also as noted, this comparative area is regarded by the Commission as one of lesser consequence. This does not, however, provide ground for its being disregarded. Nor can we follow the judgment of the examiner that in this comparative area "there is legitimate doubt as to whether mere numbers may not constitute a self-defeating proposition." This judgment was based on the rationale that "An applicant with a large number of stockholders engaged in manifold enterprises is also likely to be an applicant in which authority is scattered, with the consequence that no one stockholder would have much chance to make his ideas prevail." And were it to be followed, we fail to perceive a basis which would preclude the same consideration from

applying equally to residence and civic activities. This consideration, if present, would not lessen the degree of area familiarity arising out of local residence, civic activities, and diversification of business interests. It is in the composite weighing of the overall showing of an applicant that significance of its showing in area familiarity is to be weighed, and the demonstrated area familiarity must be weighed in the light of the integration and management proposals rather than on an assumption of that which is "likely." In this comparison, the showings of Civic and Miami Television are deemed equal and superior to those of Wilson and South Florida. A preference is accorded South Florida over Wilson in view of Mr. MacDonald's business associations in the Miami area.

13. Weighing these components of area familiarity, we are in agreement with the conclusion of the examiner that the showings of Civic and of Miami Television are equal one to the other and superior to those of Wilson and South Florida, and that South Florida "is a very close second." The examiner noted the strength of the showing of Wilson through its stockholders, Topmiller and Welstead, but did not rank it in relation to the other applicants. Because of the greater showing of local ownership and the nominal difference in diversity of business backgrounds, the showing of South Florida is somewhat superior to that of Wilson. Looking, however, to the basic significance of this comparison, i.e., assurance of present and continued insight into the ever-changing needs of the area and through such knowledge some assurance as to their being met, it is evident that the showing of each is strong. This composite factor thus can here be controlling only if substantial equality is present in other factors which look toward assurance of effectuation of the proposals made.

Broadcast Experience

14. In the comparative area of broadcast experience, the examiner concluded that South Florida is to be preferred,

with Wilson a close second, Miami Television third, and Civic fourth. In reaching his conclusion preferring South Florida, the examiner gave overriding weight to the experience of Koessler (10 percent), vice president and general manager; May (5 percent), secretary and program director; and Needs (5 percent), chief engineer. Each does have, as reflected in the findings of fact, broadcast experience in both radio and television in fields consonant with the positions to be held. Koessler has [518] management experience in sales and as general manager of radio and television stations. May has experience as program assistant and program director. Needs has experience as chief engineer of both radio and television stations. All have experience in these capacities in the Miami area. MacDonald, the chief executive officer and 80-percent stockholder, however, has no broadcast experience of any kind. Thus, the degree of credit for the stockholders of South Florida having broadcast experience is diluted by the fact that their combined holding (20 percent) leaves control wholly in the hands of Mr. MacDonald who has no operating experience of decisional significance. *Radio Associates, Inc.*, 21 R.R. 368, 370e. *Grand Broadcasting Company*, 2 R.R. 2d 327, 344. Also, the experience of one is restricted to the technical areas of operation. Topmiller and Welstead of Wilson hold beneficially 51.8 percent of the stock of Wilson and voting control of 70.8 percent. Each has an impressive background of broadcast experience, also encompassing operation of a television station in the Miami area. As the chief executive officers, general manager, and controlling stockholders, they are in a position to exercise substantial control over station policies and to thus reflect the benefit of their experience in station operations. Civic presents only a 0.4-percent stockholder having broadcast experience. This individual, Edward E. Lewis, would hold the position of "operations manager" and is neither an officer nor director of the corporation. Of Miami Television's stockholders, Pollock (5.25 percent), Bourbakis (0.23 percent), Claflin (2.99 percent), Creamer (3.74 per-

cent), Hinners (2.99 percent), and Spears (2.90 percent) show broadcast experience and would devote full time to the proposed operation (combined interest, 18.19 percent). Of these, only Pollock is an officer of the corporation, executive vice president, and would be general manager. The others would function in staff positions, respectively, as follows: Spanish-language news director, assistant general manager-news manager, local sales manager, assistant general manager-program director, and chief engineer.[2] Mr. Pollock shows experience as general manager of a radio station for a period of approximately 2 years and programing experience in both radio and television totaling approximately 4 years. Mr. Bourbakis' experience is mainly in Spanish-language news programing. Claflin's station management experience is both very limited and remote in time and is of no significance. His experience as talent on Miami radio and television stations is, however, of limited weight. Mr. Creamer has experience as local sales manager and assistant manager of an operating television station extending from 1955 and had prior programing and sales experience in radio. Mr. Hinners shows sales, programing, and management experience in radio extending over a period of approximately 12 years, and since 1962 has been account executive with a television station. Mr. Spears has experience as an engineer in television and as an engineer-announcer in radio extending over a period of approximately 13 years. [519] In the light of the above-noted significant factual differences, we conclude that the evidentiary showing of Wilson must be deemed substantially superior to that of any other appli-

---

[2] The experience of stockholders Woods, Pierce, and Lincoln is not of decisional weight. Woods is a nonresident director of the corporation. Pierce's experience is too limited and of such indirect nature as to make it of no significance. Though Lincoln's experience with advertising agencies should be of assistance in his duties as national sales manager, this is not experience of a nature to which the Commission looks for assurance of effectuation of proposals.

cant. Because of the greater degree of experience shown for some of the principals of South Florida, and the fact of actual television operating experience in the area to be served, we conclude that the showing of South Florida gives it a lesser basis of preference over Miami Television, with all three having a substantial preference over Civic.

Integration of Ownership With Management

15. Wilson's integration showing rests on Messrs. Topmiller and Welstead, as previously noted the majority stockholders and chief executive officers of this applicant. They also have primary responsibility for programing policy of station WLBW-TV. Each would continue to devote full time to the day-to-day operations of station WLBW-TV other than the nominal time given by Mr. Topmiller to general affairs of the licensee. Civic would integrate on a full-time basis stockholders Crandon as president and general manager; Noetzel as vice president in charge of news and sports programing; Skinner as vice president in charge of sales, traffic, and promotion; and Lewis as operations manager. They hold a combined stock interest of 24.99 percent. Stockholders Cook (8.33 percent) and Maxwell (8.33 percent) would devote approximately 1 day a week to the proposed operation as office manager and general counsel, respectively. South Florida would integrate on a full-time basis stockholders Koessler as vice president and general manager, May as secretary and program director, and Needs as chief engineer. They hold a combined stock interest of 20 percent. Stockholder MacDonald would devote 30 to 35 hours per week to the designated duties, and additional time if needed, but has included as a function for the station the time to be devoted to his continuing personal participation in community affairs. Other functions would also involve contacts with visting celebrities and community leaders. It thus appears that a substantial though unspecified degree of his proposed participation is not creditable under this factor, and some

creditable duties in effect represent liaison with civic organizations and groups rather than day-to-day station operations. Miami would integrate on a full-time basis stockholders Pollock as executive vice president and general manager, Hinners as assistant general manager and program director, Claflin as assistant general manager and news manager, Bourbakis as Spanish-language news director, Spears as chief engineer, Lincoln as national sales representative, and Creamer as local sales manager. They hold a combined stock interest of 21.18 percent. Pierce would devote 50 percent of his time to his duties as president and in public relations, Davis 20 hours per week as director of minority group programing, and Bishop 20 hours per week as director of public affairs programing. They hold a combined stock interest of 13.82 percent.

16. The above evidentiary showings have been summarized to make clear the basis of the differences in our conclusions in this comparative area and those of the examiner. The examiner concluded that taking all factors into account, it seems clear that Wilson and South Florida [520] stand far ahead of their adversaries and, with all of South Florida's stockholders scheduled for active full-time employment, the preference must go to that applicant. Neither the record nor the examiner's findings of fact, however, support his statement that all of South Florida's stockholders are scheduled for active full-time employment. With reference to Mr. MacDonald, his findings in this area were: "He [MacDonald] intends to devote as much time as necessary to the operation of South Florida, and he intends to be 'a very firm part' of the operation of the station." Such testimony is, however, incompetent to establish either a definable degree of participation "or active full-time employment". Nor, if fully creditable, would the 30 to 35 hours per week commitment establish full-time employment.

17. Weighing these showings, it is apparent that Wilson has achieved the greatest degree of integration on a full-

time basis. Those integrated represent the controlling stock interest, exercise all managerial functions, and substantially control station policy as the principal officers and as directors of the corporation. The degree of ownership interest represented by those integrated on a full-time basis by the other applicants does not differ significantly, varying from 20 to 24.99 percent. The proposed general manager of each would be a minority stockholder devoting full time to the proposed station and is an officer of the corporation. Miami shows the greatest number of stockholders integrated on a full-time basis, but the differences in managerial and policy functions are not such as to provide a basis of preference. The integration of Civic on a part-time basis is a nominal consideration in view of the duties to be performed and the limited time involved. We cannot credit to South Florida in this factor the time Mr. MacDonald would continue to devote to personal participation in civic affairs, there being no basis for distinction between Mr. MacDonald's continuing activities and those of all other principals of South Florida and of the other applicants. Mr. MacDonald must, nevertheless, be credited with participation on a part-time basis, and as 80-percent stockholder, president of the corporation, and one of three directors, he is in a position to exercise a substantial degree of control over station policy. Miami shows part-time integration of its president and part-time integration of its directors of minority group programing and public affairs programing. The combined functions are similar to those of Mr. MacDonald, but the combined ownership interest represented is substantially less than that of Mr. MacDonald in South Florida. The degree of participation through stockholder committees as detailed in the findings of fact proposed by Civic and Miami has been noted. The functions and depth of participation thus proposed are not such as to merit significant weight under this comparative factor. Weighing the composite showings of the applicants, that of each against the others, it is evident that Wilson must be accorded a substantial degree of superiority in this compari-

son. Because of the 80-percent interest represented and the degree of functional and policy control thus presented through its part-time integration, South Florida has established a basis of preference over Civic and Miami Television, the preference being somewhat greater as related to Civic than Miami [521] Television, Civic having made the weakest showing in this comparative factor.

Past Broadcast Performance

18. Wilson only in this proceeding can claim a past broadcast record. As reflected in the findings of fact, it has for many years been the licensee of station WCKY, Cincinnati, Ohio. We are in agreement with the conclusion of the examiner that the evidence as to programing at that station reveals a satisfactory operation. Its record in news programing is good. Balance is shown between commercial and sustaining programs and substantial percentages of its 24-hour-per-day operation, as reflected in the various composite weeks presented in evidence, were devoted to local live programs. Attention is shown to local needs and community problems on regularly scheduled programs. A large number of noncommercial spot announcements is shown for each of these composite weeks. Its concern for the national interest is also demonstrated by the use of the station's facilities during the recent Cuban crisis and by its locally originated program giving analyses of Russian oversea propaganda broadcasts.

19. We are also in agreement with the examiner's conclusion that the evidentiary showing admitted in evidence for the initial 4-month period of operation by station WLBW–TV shows many commendable aspects. During this period an exceptionally meritorious operation was achieved. We also recognize the force of Wilson's contention that this is the most difficult period of operation for a new station and that had the examiner permitted a showing for the full period of operation prior to commencement of the hearing, the evidence may have shown its record of

performance to have been even more outstanding. We nevertheless do have before us the record of performance for the composite week specified by the Commission for the application here under consideration which constitutes the most probative evidence for the reasons noted in paragraph 8, supra. Also to be considered is the circumstance that both this record and that for the excluded period were compiled with the aforeknowledge that a comparative proceeding in which they would be closely scrutinized was probable or certain. Thus, though normally a past broadcast record represents as persuasive evidence as can be marshaled by an applicant, the record of WLBW–TV must here be weighed in the light of the unusual circumstances under which it was compiled. This is neither a new nor novel consideration in Commission proceedings. (See *Jefferson Standard Broadcasting Co.*, 24 R.R. 334, 334e; *Melody Music, Inc.*, 36 FCC 701; *Radio Station WSOC, Inc.*, 12 R.R. 953, 1008; *Community Broadcasting Service, Inc.*, 13 R.R. 179.) There is no intent here to deprecate either the efforts of Wilson to present a television service of the highest order or the service having resulted from these efforts. We seek only to make clear the reasons precluding our giving to this comparative factor, in the context of this proceeding, the full significance and weight it might have if compiled under other circumstances. Wilson having, however, demonstrated its ability to render a television service of this order in combination with its record of performance for station WCKY as presented in the instant proceeding, we cannot, [522] as did the examiner, wholly reject these records as factors in this proceeding. We conclude, however, that the basis for preference of the application of Wilson so established is minor in nature.

Diversification of Control of Media of Mass Communications

20. This proceeding raises only a single consideration having significance under the Commission's policy of seeking diversification of the ownership of media of mass com-

munications. As reflected in the findings of fact, Messrs. Pollock and Woods of Miami Television hold other broadcast interests, none located in the Miami area. No significance can attach to these interests in view of the limited nature of Mr. Pollock's interests in both Miami Television and in existing stations and of Mr. Woods' interest in Miami Television. The examiner also found the ownership by Wilson of station WCKY, Cincinnati, Ohio, to be without significance. Ownership of this station raises no problems of either local or sectional concentration of control, which is of greater concern to the Commission than ownership of such interests without restriction to locality. (*The Toledo Blade Co.*, 15 R.R. 739, 824, citing *Radio Wisconsin, Incorporated,* 10 R.R. 1224.) A grant to Wilson would, however, place under its control a second broadcast facility, whereas none of the other applicants are presently associated with media of mass communications to a significant degree. A basis of preference is, therefore, established and is here accorded the other applicants though minor in nature in view of the remoteness of the locations one to the other and that only a single standard broadcast and single television station are involved.

Preparation and Planning

21. The steps taken by each applicant in preparation and planning of its proposal have been detailed in the findings of fact. Though Civic takes extensive exceptions to the findings with reference to its preparation and planning, careful review of the record fully substantiates these findings and the conclusions of the examiner based thereon. We are also in agreement with the other conclusions of the examiner in this comparative area other than for the slight preference accorded South Florida over Wilson and Miami Television. We find no basis of preference among these, with all having made a superior showing to that of Civic. The examiner based his ranking of the applicants in this comparison on the orderliness and comprehensiveness of

techniques to ascertain basic needs. The minor preference of the other applicants over Civic here accorded rests on the more meaningful manner in which the other applicants compiled and used the survey results. Between Wilson, South Florida, and Miami Television, though the techniques followed differed, we find no meaningful differences. As stated in the conclusions of the examiner which we adopt, the precise techniques for conducting a survey are within the choice of the applicant. Indifference [523] in compilation and use of the data developed, however, cannot be equated to differences of technique. And such indifference must be regarded as indicative of future actions.

SUMMARY

22. Summarizing the comparative standings of the applicants, equality is shown in programing, policies, staff, studio, and equipment. Civic and Miami Television have been accorded an equally shared preference in area familiarity, with South Florida being a close second and Wilson also having made a strong showing. Wilson, South Florida, and Miami Television share a minor preference over Civic in planning. South Florida, Civic, and Miami Television share a minor preference over Wilson under the factor of diversification of control of media of mass communications. Looking to those factors tending to assure effectuation of the proposals made, the showing of Wilson in broadcast experience and integration of ownership with management is substantially superior to that of any other applicant. We also draw some assurance from its past record of broadcast performance, though it cannot be accorded the normal significance arising from this factor in view of the circumstances under which this record, particularly in Miami, was made. Taking into account the weight to be accorded the factors in which there is a cognizable difference among the applicants and the degree of difference in each such factor, it becomes apparent that L. B. Wilson, Inc., is the best qualified applicant. As noted, supra, in the

light of the strength of the showing of each applicant in area familiarity, it could here be controlling only if substantial equality is present in other factors. Though such equality is found in the proposals advanced, in the factors tending toward assurance of effectuation of these proposals the superiority of Wilson stands established. It has achieved a combination of factors in no way approached by any other applicant. Majority stockholders having local residence, local civic associations, and many years of broadcast experience would be integrated on a full-time basis. These stockholders would hold positions enabling them to bring to bear in the operation these qualifications on both a policy level and on the day-to-day operations of the station. Unnecessary to establish this superiority, but adding somewhat thereto, is its past broadcast record. This superiority greatly outweighs the minor bases of preference present for any other applicant. It is, therefore, concluded that a grant of the application of L. B. Wilson, Inc., will best serve the public interest.

Accordingly, *It is ordered,* This 29th day of July 1964, that the application of L. B. Wilson, Inc., for renewal of license of television station WLBW-TV (including TV STL station KIS–77 and TV pickup station KE–7759), *Is granted;* and the applications of Civic Television, Inc., of South Florida Television Corp., and of Miami Television Corp., for construction permits for new television broadcast stations to operate on channel 10 at Miami, Fla., *Are denied.*

• • • • • • • • • • •

[532] DISSENTING STATEMENT OF CHAIRMAN E. WILLIAM HENRY

I would, in substance, adopt the findings and conclusions of the examiner, who recommends a grant to South Florida Television Corp. I would stress, more than he does, however, the fact that the residence of the critical L. B. Wilson principals in Miami is of an exceedingly recent vintage,

starting in 1960 at the earliest. Without in any way disregarding the many excellent qualifications of the L. B. Wilson organization, I think we must recognize that in Wilson we are dealing with a group of professional broadcasters, whose primary experience has been in AM radio and whose interest in Miami has always depended [533] upon the possibility that they might operate the very television station here in question. If the Commission's traditional emphasis upon the virtues of local ownership and local area familiarity is to retain meaning, Wilson must rate well below its rivals on these factors.

The only respect in which Wilson is clearly and unequivocally superior to its rivals is that of integration of ownership with management. Because of its superior integration, its previous experience may well be brought to bear upon its proposed operation in a most effective manner. But we cannot therefore say that its past broadcast experience (which includes very limited television experience) is superior to that of South Florida, without engaging in obvious "double counting."

Finally, assuming that Wilson is entitled to rely upon its record of past performance on channel 10 in Miami, that record is extraordinarily short. At all times during its compilation the applicant was faced with a practical certainty that it would be involved in a comparative hearing in the near future. In such circumstances, I cannot accord the Wilson record even the slight significance which the majority strains to afford it.

On the case as a whole, I do not think that any of the factors favoring Wilson outweigh the clear inferiority on the local factors—even without considering Wilson's additional inferiority in terms of diversification of control over media of mass communication. Considering the local applicants, I agree with the examiner's selection of South Florida.

For these reasons, I dissent.

APPENDIX C

Statute Involved—Communications Act of 1934, as Amended

Section 301, 48 Stat. 1081 (1934), 47 U.S.C. § 301 (1964 ed.):

> § 301. License for radio communication or transmission of energy
>
> It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. * * *

Section 304, 48 Stat. 1083 (1934), 47 U.S.C. § 304 (1964 ed.):

> § 304. Waiver by license of claims to particular frequency or of ether
>
> No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

Section 307, 48 Stat. 1083 (1934), 66 Stat. 714 (1952), 74 Stat. 889 (1960), 47 U.S.C. § 307:

> § 307. Licenses; allocation of facilities; terms; renewals
>
> (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.
>
> * * *
>
> (d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be

granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. In order to expedite action on application for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 of this title, the Commission shall continue such license in effect. Consistently with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action.

• • •

Section 309, 74 Stat. 889 (1960), 47 U.S.C. § 309 (1964 ed.):

§ 309. Application for license—Considerations in granting application

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

• • •

(h) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) the station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; * * *

APPENDIX D

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

FCC 65-689
71120
Public Notice—B
July 28, 1965

POLICY STATEMENT ON COMPARATIVE BROADCAST HEARINGS

[5 Pike & Fischer Radio Reg. 2d 1901, 1907]*

By the Commission: Commissioners Hyde and Bartley dissenting and issuing statements; Commissioner Lee concurring and issuing a statement.

One of the Commission's primary responsibilities is to choose among qualified new applicants for the same broadcast facilities.[1] This commonly requires extended hearings into a number of areas of comparison. The hearing and decision process is inherently complex, and the subject does not lend itself to precise categorization or to the clear making of precedent. The various factors cannot be assigned absolute values, some factors may be present in some cases and not in others, and the differences between applicants with respect to each factor are almost infinitely variable.

Furthermore, membership on the Commission is not static and the views of individual Commissioners on the importance of particular factors may change. For these and other reasons, the Commission is not bound to deal with all cases at all times as it has dealt in the past with some that seem comparable, *Federal Communications Com-*

* The bracketed boldface numbers appearing hereafter in this appendix refer to succeeding pages of this public notice in the unofficial reporter, Pike and Fischer Radio Regulation.

[1] This statement of policy does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license.

mission v. *WOKO, Inc.*, 329 U.S. 223, 228,[2] and changes of viewpoint, if reasonable, are recognized as both inescapable and proper. *Pinellas Broadcasting Co.* v. *Federal Communications Commission*, 97 U.S. App. D.C. 236, 230 F. 2d 204, *cert. den.* 350 U.S. 1007.

All this being so, it is nonetheless important to have a high degree of consistency of decision and of clarity in our basic policies. It is also obviously of great importance to prevent undue delay in the disposition of comparative hearing cases. A general review of the criteria governing the disposition of comparative broadcast hearings will, we believe, be useful to parties appearing before the Commission. It should also be of value to the examiners who initially decide the cases and to the Review Board to which the basic review of examiners' decisions in this area has been delegated. See Section 0.365 of our Rules, 47 CFR 0.365.[3]

This statement is issued to serve the purpose of clarity and consistency of decision, and the further purpose of eliminating from the hearing process time-consuming elements not substantially related to the public interest. We recognize, of course, that a general statement cannot dispose of all problems or decide cases in advance. Thus, for example, a case where a party proposes a specialized service will have to be given somewhat different consideration. Difficult cases will remain difficult. Our purpose is to promote stability of judgment without foreclosing the right of every applicant to a full hearing.

---

[2] "[T]he doctrine of *stare decisis* is not generally applicable to the decisions of administrative tribunals," *Kentucky Broadcasting Corp.* v. *Federal Communications Commission*, 84 U.S. App. D.C. 383, 385, 174 F. 2d 38, 40.

[3] On June 15, 1964 the rule was amended to give the Review Board authority to review initial decisions of hearing examiners in comparative television cases, a function formerly performed only by the Commission itself.

[1908] We believe that there are two primary objectives toward which the process of comparison should be directed. They are, first, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications. The value of these objectives is clear. Diversification of control is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities.[4] Equally basic is a broadcast service which meets the needs of the public in the area to be served, both in terms of those general interests which all areas have in common and those special interests which areas do not share. An important element of such a service is the flexibility to change as local needs and interests change. Since independence and individuality of approach are elements of rendering good program service, the primary goals of good service and diversification of control are also fully compatible.

Several factors are significant in the two areas of comparison mentioned above, and it is important to make clear the manner in which each will be treated.

1. *Diversification of control of the media of mass communications.* Diversification is a factor of primary sig-

---

[4] As the Supreme Court has stated, the First Amendment to the Constitution of the United States "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," *Associated Press* v. *United States,* 326 U.S. 1, 20. That radio and television broadcast stations play an important role in providing news and opinion is obvious. That it is important in a free society to prevent a concentration of control of the sources of news and opinion and, particularly, that government should not create such a concentration, is equally apparent, and well established. *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192; *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 89 U.S. App. D.C. 13, 189 F. 2d 677, *cert. den.* 342 U.S. 830.

nificance since, as set forth above, it constitutes a primary objective in the licensing scheme.

As in the past, we will consider both common control and less than controlling interests in other broadcast stations and other media of mass communications. The less the degree of interest in other stations or media, the less will be the significance of the factor. Other interests in the principal community proposed to be served will normally be of most significance, followed by other interests in the remainder of the proposed service area[5] and, finally, [1909] generally in the United States. However, control of large interests elsewhere in the same state or region may well be more significant than control of a small medium of expression (such as a weekly newspaper) in the same community. The number of other mass communication outlets of the same type in the community proposed to be served will also affect to some extent the importance of this factor in the general comparative scale.

It is not possible, of course, to spell out in advance the relationships between any significant number of the various factual situations which may be presented in actual hearings. It is possible, however, to set forth the elements which we believe significant. Without indicating any order of priority, we will consider interests in existing media of mass communications to be more significant in the degree that they:

(A) are larger, i.e., go towards complete ownership and control;

---

[5] Sections 73.35(a), 73.240(a)(1) and 73.636(a)(1) of our rules, 47 CFR 73.35(a), 73.240(a)(1), 73.636(a)(1), prohibit common control of stations in the same service (AM, FM and TV) within prescribed overlap areas. Less than controlling ownership interests and significant managerial positions in stations and other media within and without such areas will be considered when held by persons with any ownership or significant managerial interest in an applicant.

and to the degree that the existing media:

(B) are in, or close to, the community being applied for;

(C) are significant in terms of numbers and size, i.e., the area covered, circulation, size of audience, etc.;

(D) are significant in terms of regional or national coverage; and

(E) are significant with respect to other media in their respective localities.

2. *Full-time participation in station operation by owners.* We consider this factor to be of substantial importance. It is inherently desirable that legal responsibility and day-to-day performance be closely associated. In addition, there is a likelihood of greater sensitivity to an area's changing needs, and of programming designed to serve these needs, to the extent that the station's proprietors actively participate in the day-to-day operation of the station. This factor is thus important in securing the best practicable service.[6] It also frequently complements the objective of diversification, since concentrations of control are necessarily achieved at the expense of integrated ownership.

We are primarily interested in full-time participation. To the extent that the time spent moves away from full time, the credit given will drop sharply, and no credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis. In assessing proposals, we will also look to the positions which the participating owners will occupy, in order to determine the extent of their policy functions and the likelihood of their playing important roles in management. We will accord particular weight to staff positions

---

[6] As with other proposals, it is important that integration proposals be adhered to on a permanent basis. See *Tidewater Teleradio, Inc.*, 24 Pike & Fischer, R.R. 653.

held by the owners, such as general [1910] manager, station manager, program director, business manager, director of news, sports or public service broadcasting, and sales manager. Thus, although positions of less responsibility will be considered, especially if there will be full-time integration by those holding those positions, they cannot be given the decisional significance attributed to the integration of stockholders exercising policy functions. Merely consultative positions will be given no weight.

Attributes of participating owners, such as their experience and local residence, will also be considered in weighing integration of ownership and management. While, for the reasons given above, integration of ownership and management is important *per se,* its value is increased if the participating owners are local residents and if they have experience in the field. Participation in station affairs on the basis described above by a local resident indicates a likelihood of continuing knowledge of changing local interests and needs.[7] Previous broadcast experience, while not so significant as local residence, also has some value when put to use through integration of ownership and management.

Past participation in civic affairs will be considered as a part of a participating owner's local residence background, as will any other local activities indicating a knowledge of and interest in the welfare of the community. Mere diversity of business interests will not be considered. Generally speaking, residence in the principal community to be served will be of primary importance, closely followed by residence outside the community, but within the proposed service area. Proposed future local residence (which is expected to accompany meaningful participation) will also be accorded less weight than present residence of several years' duration.

---

[7] Of course, full-time participation is also necessarily accompanied by residence in the area.

Previous broadcasting experience includes activity which would not qualify as a past broadcast record, i.e., where there was not ownership responsibility for a station's performance. Since emphasis upon this element could discourage qualified newcomers to broadcasting, and since experience generally confers only an initial advantage,[8] it will be deemed of minor significance. It may be examined qualitatively, upon an offer of proof of particularly poor or good previous accomplishment.

The discussion above has assumed full-time, or almost full-time participation in station operation by those with ownership interests. We recognize that station ownership by those who are local residents and, to a markedly lesser degree, by those who have broadcasting experience, may still be of some value even where there is not the substantial participation to which we will accord weight under this heading. Thus, local residence complements the statutory scheme and Commission allocation policy of licensing a large number [1911] of stations throughout the country, in order to provide for attention to local interests, and local ownership also generally accords with the goal of diversifying control of broadcast stations. Therefore, a slight credit will be given for the local residence of those persons with ownership interests who cannot be considered as actively participating in station affairs on a substantially full-time basis but who will devote some time to station affairs, and a very slight credit will similarly be given for experience not accompanied by full-time participation. Both of these factors, it should be emphasized, are of minor significance. No credit will be given either the local residence or experience of any person who will not put his knowledge of the community (or area) or experience to any use in the operation of the station.

---

[8] Lack of experience, unlike a high concentration of control, is remediable. *See Sunbeam Television Corp.* v. *Federal Communications Commission,* 100 U.S. App. D.C. 82, 243 F. 2d 26.

3. *Proposed program service.* The United States Court of Appeals for the District of Columbia Circuit has stated that, "in a comparative consideration, it is well recognized that comparative service to the listening public is the vital element, and programs are the essence of that service." *Johnston Broadcasting Co.* v. *Federal Communications Commission,* 85 U.S. App. D.C. 40, 48, 175 F. 2d 351, 359. The importance of program service is obvious. The feasibility of making a comparative evaluation is not so obvious. Hearings take considerable time and precisely formulated program plans may have to be changed not only in details but in substance, to take account of new conditions obtaining at the time a successful applicant commences operation. Thus, minor differences among applicants are apt to prove to be of no significance.

The basic elements of an adequate service have been set forth in our July 27, 1960 "Report and Statement of Policy Re: Commission *en banc* Programming Inquiry," 25 F.R. 7291, 20 Pike & Fischer, R.R. 1901, and need not be repeated here.[9] And the applicant has the responsibility for a reasonable knowledge of the community and area, based on surveys or background, which will show that the program proposals are designed to meet the needs and interests of the public in that area. See *Henry* v. *Federal Communications Commission,* 112 U.S. App. D.C. 257, 302 F. 2d 191, *cert. den.* 371 U.S. 821. Contacts with local civic and other groups and individuals are also an important means of formulating proposals to meet an area's needs and interests. Failure to make them will be considered a serious deficiency, whether or not the applicant is familiar with the area.

Decisional significance will be accorded only to material and substantial differences between applicant's proposed

---

[9] Specialized proposals necessarily have to be considered on a case-to-case basis. We will examine the need for the specialized service as against the need for a general-service station where the question is presented by competing applicants.

program plans. See *Johnston Broadcasting Co.* v. *Federal Communications Commission*, 85 U.S. App. D.C. 40, 175 F. 2d 351. Minor differences in the proportions of time allocated to different types of programs will not be considered. Substantial differences will be considered to the extent that they go beyond ordinary differences in judgment and show a superior devotion to public service. For example, an unusual attention to local community matters for which there is a demonstrated need, [1912] may still be urged. We will not assume, however, that an unusually high percentage of time to be devoted to local or other particular types of programs is necessarily to be preferred. Staffing plans and other elements of planning will not be compared in the hearing process except where an inability to carry out proposals is indicated.[10]

In light of the considerations set forth above, and our experience with the similarity of the program plans of competing applicants, taken with the desirability of keeping hearing records free of immaterial clutter, no comparative issue will ordinarily be designated on program plans and policies, or on staffing plans or other program planning elements, and evidence on these matters will not be taken under the standard issues. The Commission will designate an issue where examination of the applications and other information before it makes such action appropriate, and applicants who believe they can demonstrate significant differences upon which the reception of evidence will be useful may petition to amend the issues.

No independent factor of likelihood of effectuation of proposals will be utilized. The Commission expects every

---

[10] We will similarly not give independent consideration to proposed studios or other equipment. These are also elements of a proposed operation which are necessary to carry out the program plans, and which are expected to be adequate. They will be inquired into only upon a petition to amend the issues which indicates a serious deficiency.

licensee to carry out its proposals, subject to factors beyond its control, and subject to reasonable judgment that the public's needs and interests require a departure from original plans. If there is a substantial indication that any party will not be able to carry out its propsals to a significant degree, the proposals themselves will be concidered deficient.[11]

4. *Past broadcast record.* This factor includes past ownership interest and significant participation in a broadcast station by one with an ownership interest in the applicant. It is a factor of substantial importance upon the terms set forth below.

A past record within the bounds of average performance will be disregarded, since average future performance is expected. Thus, we are not interested in the fact of past ownership *per se,* and will not give a preference because one applicant has owned stations in the past and another has not.

We are interested in records which, because either unusually good or unusually poor, give some indication of unusual performance in the future. Thus, we shall consider past records to determine whether the record shows (i) unusual attention to the public's needs and interests, such as special sensitivity to an area's changing needs through flexibility of local programs designed to [1913] meet those needs, or (ii) either a failure to meet the public's needs and interests or a significant failure to carry out representations made to the Commission (the fact that such representations have been carried out, however, does not lead to an affirmative preference for the applicant, since it is expected, as a matter of course, that a licensee will carry out representations made to the Commission).

---

[11] It should be noted here that the absence of an issue on program plans and policies will not preclude cross-examination of the parties with respect to their proposals for participation in station operation, i.e., to test the validity of integration proposals.

If a past record warrants consideration, the particular reasons, if any, which may have accounted for that record will be examined to determine whether they will be present in the proposed operation. For example, an extraordinary record compiled while the owner fully participated in operation of the station will not be accorded full credit where the party does not propose similar participation in the operation of the new station for which he is applying.

5. *Efficient use of frequency.*[12] In comparative cases where one or two or more competing applicants proposes an operation which, for one or more engineering reasons, would be more efficient, this fact can and should be considered in determining which of the applicants should be preferred. The nature of an efficient operation may depend upon the nature of the facilities applied for, i.e., whether they are in the television or FM bands where geographical allocations have been made, or in the standard broadcast (AM) band where there are no such fixed allocations. In addition, the possible variations of situations in comparative hearings are numerous. Therefore, it is not feasible here to delineate the outlines of this element, and we merely take this occasion to point out that the element will be considered where the facts warrant.

6. *Character.* The Communications Act makes character a relevant consideration in the issuance of a license. See Section 308(b), 47 U.S.C. 308(b). Significant character deficiencies may warrant disqualification, and an issue will be designated where appropriate. Since substantial demerits may be appropriate in some cases where disqualification is not warranted, petitions to add an issue on conduct relating to character will be entertained. In the absence of a designated issue, character evidence will not

---

[12] This factor as discussed here is not to be confused with the determination to be made of which of two communities has the greater need for a new station. See *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358.

be taken. Our intention here is not only to avoid unduly prolonging the hearing process, but also to avoid those situations where an applicant converts the hearing into a search for his opponents' minor blemishes, no matter how remote in the past or how insignificant.

7. *Other Factors.* As we stated at the outset, our interest in the consistency and clarity of decision and in expedition of the hearing process is not intended to preclude the full examination of any relevant and substantial factor. We will thus favorably consider petitions to add issues when, but only when, they demonstrate that significant evidence will be adduced.[13]

[1914] We pointed out at the outset that in the normal course there may be changes in the views of individual commissioners as membership on the Commission changes or as commissioners may come to view matters differently with the passage of time. Therefore, it may be well to emphasize that by this attempt to clarify our present policy and our views with respect to the various factors which are considered in comparative hearings, we do not intend to stultify the continuing process of reviewing our judgment on these matters. Where changes in policy are deemed appropriate they will be made, either in individual cases or in further general statements, with an explanation of the reason for the change. In this way, we hope to preserve the advantages of clear policy enunciation without sacrificing necessary flexibility and open-mindedness.

Cases to be decided by either the Review Board or, where the Review Board has not been delegatd that function, by the Commission itself, will be decided under the policies

---

[13] Where a narrow question is raised, for example on one aspect of financial qualification, a narrowly drawn issue will be appropriate. In other circumstances, a broader inquiry may be required. This is a matter for *ad hoc* determination.

here set forth. So too, future designations for hearing will be made in accordance with this statement. Where cases are now in hearing, the hearing examiner will be expected to follow this statement to the extent practicable. Issues already designated will not be changed, but evidence should be adduced only in accordance with this statement. Thus, evidence on issues which we have said will no longer be designated in the absence of a petition to add an issue, should not be accepted unless the party wishing to adduce the evidence makes an offer of proof to the examiner which demonstrates that the evidence will be of substantial value under the criteria discussed herein. Since we are not adopting new criteria which would call for the introduction of new evidence, but rather restricting the scope somewhat of existing factors and explaining their importance more clearly, there will be no element of surprise which might affect the fairness of a hearing. It is, of course, traditional judicial practice to decide cases in accordance with principles in effect at the time of decision. Administrative finality is also imporant. Therefore, cases which have already been decided, either by the Commission or, where appropriate, by the Review Board, will not be reconsidered. We believe that our purpose to improve the hearing and decisional process in the future does not require upsetting decisions already made, particularly in light of the basically clarifying nature of this document.

DISSENTING STATEMENT OF COMMISSIONER HYDE

I dissent to the adoption of the "Policy Statement on Comparative Broadcast Hearings" issued July 28, 1965.

One of the expressed objectives of the Policy Statement is the simplification and the expedition of the Commission's processes with respect to decisions in comparative cases. I agree with the majority that this is a most desirable objective; however, the policy statement as now framed will not achieve expedition. Moreover, to the extent that a degree of simplification of our decisional process may re-

sult from its adoption, this result, in my opinion, would be at a price which would be prohibitive and perhaps unlawful. It would press applicants into a mold in order to meet the Commission's preconcieved standards, thus deterring perhaps better-qualified applicants from applying; it would preclude significant consideration of material differences among applicants and result in automatic preference of applicants slavishly conforming to [1915] the mold, and eventually force the Commission to decide cases on trivial differences among applicants since basically they would all have come out of the same press. I consider this much too high a price to pay to achieve the majority's objective.

I think the initiative in proposing how stations should be owned and operated should remain with the applicants, thus providing opportunities for diversified approaches. Moreover, in the interest of diversity, the initiative for the presentation of program plans should be left with applicants and without undue circumscription as to what should be included or excluded. Then, as a matter of elementary fairness, as well as due process, applicants should be entitled to examination and comparison on the merit of their respective proposals—not merely comparison with previously-adopted positions. It may be that the check-off approach (as argued in the Policy Statement) will be helpful to Examiners and others in making decisions, but even this illusion of facility is certain to disappear as to cases involving competing new applicants who can plan to conform to prescribed formulas.

When competing applications for facilities are filed, the Commission must make an election which involves a comparison of characteristics. As was stated in *Johnson Broadcasting Company* v. *F.C.C.*, U.S.C.A., D.C., May 4, 1949:

> "The Commission cannot ignore a material difference between two applicants and make findings in respect

to selected characteristics only. Neither can it base its conclusion upon a selection from among its findings of differences and ignore all other findings. It must take into account all the characteristics which indicate differences, and reach an overall relative determination upon an evaluation of all factors, conflicting in many cases . . ."

In this situation, and in order to comply with the directive of the Court, the Commission must consider among other things differences in makeup of applicants and differences in program proposals for the purpose of making the required comparison. But this requirement to consider differences in characteristics does not warrant the Commission to presume to establish—in the abstract—standardized preferences as to how applicants should be organized or as how program should be planned. I think that the effort to direct and standardize is incongruous with the basic policy of the Act.

I presume that one of the reasons for the adoption of the Policy Statement is to apprise potential applicants of the views of the Commission (and individual Commissioners) as to the manner in which differences among applicants will be treated. Decisions which have been made are available for this purpose. The views of the Commission and of individual Commissioners as to the effect of differences among applicants in comparative cases are set out in decisions which touch on such differences. Similarly, the specific views of dissenting or of separately-concurring Commissioners are available for analysis.

I know of no two cases where the underlying facts are identical. I know of no two cases where differences among the applicants are identical. Therefore, the significance to be given in each decision to each difference and to each criterion must of necessity vary, and must necessarily be considered in context with the other facts of the individual cases.

[1916] If the Commission has been remiss in the past in not spelling out the decisional process in each case as carefully as it should, the obvious remedy is improvement in the preparation of decisions. Moreover, through more carefully written decisions, both the Commission and the applicants can view the weight given to each difference and to each criterion in light of all of the facts in a given case. To the extent the other relevant facts in the applicant's case require the same conclusion, an applicant can assume such conclusion will be reached by the Commission. To the extent the other relevant facts require or permit a different conclusion, the Commission will be free to so conclude. However, to attempt to cure what might be considered past omissions in not fully spelling out reasons for decisions by prescribing an arbitrary order and weight to be given to each of such criteria seems to me to be idealizing form over substance, and avoiding statutory and legal requirements in doing so. This is especially true when no need exists for establishing this procedure since a simpler and more adequate solution is at hand.

The proposed fiat as to the weight which will be given to the various criteria—without sound predication of accepted data and when considered only in a vacuum and in the abstract—must necessarily result in a degree of unfairness to some applicants and in the fashioning of an unnecessary straitjacket for the Commission in its decisional process. How can we decide in advance and in a vacuum that a specific broadcaster with a satisfactory record in one community will be less likely to serve the broadcasting needs of a second community than a specific longtime resident of that second community who doesn't have broadcast experience? How can we make this decision without knowing more about each applicant? The majority now says that experience can always be acquired and, therefore, that it is less important than local residence. But the knowledge acquired from such local residence can by the same token be obtained just as easily—if not more easily

—than broadcast experience. It seems clear to me that the importance to be given to the element of experience in one case or to the element of local residence in another case will necessarily vary in light of the additional factors involved in each case.

Moreover, the decision by an individual without broadcast experience (or perhaps even without business experience) to take full control of a complicated broadcast venture is held by this proposed Policy to be entitled to a significantly greater preference than a decision by a more prudent applicant who intends to secure competent, experienced and professional management to operate a station under his general direction until he acquires a reasonable degree of experience. It may be reasonable for the Commission to make such a conclusion in the light of all of the facts in a particular case, taking into consideration the specific attributes of the individual concerned, but it is obvious that the same conclusion need not be valid in a second case where the same attributes may not be present. The fact that it may be difficult to explain different decisions in the two cases is taken by the majority as sufficient reason to establish arbitrary preferences. This I cannot accept.

The evaluation of local needs and how best to provide for them is a highly subjective matter. Is the Commission competent—in advance of a review of all of the pertinent factors in a particular case—to decide that nonprofessional opinion as to the existence of needs or as to the manner in which the needs can best be fulfilled is automatically entitled to a greater weight than professional opinion based upon prior experience in substantially identical communities? I submit that it is not, and that although the decision might be difficult to make [1917] in any one case, and perhaps even more difficult to explain where the decisions differ on this factor in two cases, there can nevertheless be sound bases for different results in

cases involving these elements. We should not be foreclosed from exploring them.

The language of the Policy Statement is quite broad in certain areas while, at the same time, the statement tries to be precise and restrictive in its proposed results. For example, terms such as "unusually high percentage of time", "unusual attention to community matters", "minor differences in the proportion of time", "ordinary differences in judgment", etc., are used without definition as to the meaning of the terms. I presume that future decisions will spell out at least some guidelines as to their meaning, but it is obvious that this will be achieved only at great cost to the applicants and after much litigation and then only in connection with the facts of a particular case. Since precise definitions are really not now feasible, why should these terms be employed? And since there appear to be no presently-existing guidelines which can be established in this document, then the ensuing wrangle in comparative cases as to what is ordinary, usual, unusual, high, etc., will take up at least the same time, if not more, than the mere introduction of proof of the basic facts.

I do not believe that the Commission has given sufficient thought to the consequences of establishing the order and weight of preferences in comparative hearing cases. *The document says that the policy is to apply to "new" applicants, and that it "does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license". I do not believe that a logical or a legal basis can be established for making a distinction between criteria to be applied to renewal applications and criteria applicable to initial applications. The statutory test is exactly the same. The intention of Congress to require the same test was affirmed in the Communications Act Amendments of 1952.* Since we must assume that the Commission will find it appropriate or necessary to make uniform application of its

statement of preferences, it is essential to consider the consequences of such application. The filing of a new application—organized according to formula—to challenge a renewal applicant could lead to a facile but in many instances unfair and arbitrary decisional process. Is the Commission now ready to read out established broadcasters, not locally owned, but otherwise without blemish in favor of any locally-owned applicants? Is the Commission now ready to read out established broadcasters who are without blemish, except that they utilize competent personnel who do not have an ownership interest, in favor of applicants who propose to operate the facilities personally? Is the Commission ready to accept a new applicant formed to meet this preconceived mold in preference to an existing broadcaster who does not fit into such mold regardless of other circumstances?

I must assume that in the above cases the Commission will not reach its judgments arbitrarily and without giving consideration to all of the significant elements. Upon this assumption, I can foresee the development of case after case where exceptions to the Policy will be found to be necessary in order to reach a decision which a majority will consider to be fair and in the public interest. I can foresee a decisional process which eventually will be substantially similar—if not virtually identical—to the one in existence. Under these circumstances, I cannot believe that the public interest will be served, or the processes of the Commission expedited, by the adoption of the proposed Policy Statement.

[1918] No useful purpose would appear to be served by further belaboring these points. While the motives of the majority may be excellent, I do not believe that its objectives can thus be achieved. Moreover, I fear that the degree of uniformity which is being sought will necessarily be detrimental to broadcasting in general and to the public interest.

An overall objection which I think I should state is that the Commission is, in effect, placing legislative-like restrictions upon performance under the responsibility Congress intended it to implement with broad discretion. It would appear that we do not trust Commissioners to exercise judgment with as much discretion as Congress intended to repose in the Agency. This restrictive approach not only limits the Agency, but, as has been indicated, threatens to inhibit the development of services which do not conform to preconceived molds.

I think that the Commission should consider—instead of the adoption of this proposed "Policy Statement"—the introduction of such modern and accepted procedural methods as "discovery"—requiring its staff to make a more careful examination of each competing applicant prior to the issuance of hearing orders so as to specify issues which will encompass all material differences among the applicants rather than ordering hearings on generalized, boilerplate issues and preconceived conclusions; and writing its decisions with such care as to eliminate frivolous and inconsequential matter and in such a manner that applicants would be readily apprised of areas which the Commission considers to be vitally imporant. I believe that discovery procedure alone will do more to bring light—and to minimize heat—in comparative cases than a general abjuration of trivia. If the parties and, in fact, the Commission can secure factual information about each of the applicants before the hearing, and if thereafter, the Commission will exercise care and discretion in the framing of the issues, more will have been achieved to shorten our hearing procedures than can reasonably be expected from the adoption of this Policy Statement.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I believe that our comparative hearings should be expedited by eliminating what has amounted to extensive bickering in the record over minutiae.

As I see it, however, the Commission majority is attempting the impossible here when it prejudges the decisional factors in future cases. My observation is that there are no two cases exactly alike. There are so many varying circumstances in each case that a factor in one may be more important than the same factor in another. Broadcasting —a dynamic force in our society—experiences constant change. I have expressed it differently on occasions by saying, "There's nothing static in radio but the noise." If we are to encourage the larger and more effective use of radio in the public interest, we must avoid becoming static ourselves.

[1919]

CONCURRING STATEMENT OF COMMISSIONER ROBERT E. LEE

Even though I recognize the Policy Statement adopted by the Commission to be the result of a sincere effort to clarify the historical process of selecting a winner in comparative broadcast hearings, I am concurring with considerable reluctance. I am disappointed that the Commission did not examine alternative methods of "picking a winner" from a group of competing applicants, each of which may be fully qualified but only one of which may be granted. For example, in a recent case involving nine applications where I unqualifiedly concurred with the result arrived at by the majority, I said:

> However, I would much prefer such appropriate changes in the Communications Act and in the Commission's practices and policies as would have permitted, in a case such as this, adoption of a procedure which would, on a comparative basis, eliminate from further consideration several of the applications, and which

would have permitted us to direct the remaining applicants to endeavor to work out a satisfactory merger arrangement within a stated reasonable period. In the event that such a merger were thereafter presented to the Commission, an award could have been given to the merged entity. Failing such a merger, the Commission would thereupon proceed to select a winner from among the limited eligibles. *Veterans Broadcasting Company, Inc., et al.*, decided January 19, 1965.

Over the years I have participated in decisions in hundreds of "comparative proceedings" and candor compels me to say that our method of selection of the winning applicant has given me grave concern. I realize, of course, that where we have a number of qualified applicants in a consolidated proceeding for a single facility in a given community, it is necessary that we grant one and deny the others. The ultimate choice of the winner generally sustains the Commission's choice despite the recent rash of remands from the Court. Thus, it would appear that we generally grant the "right" application. However, I am not so naive as to believe that granting the "right application" could not, in some cases, be one of several applications.

The criteria that the Commission now says will be decisive—assuming all other things are substantially equal—in choosing among qualified applicants for new broadcast facilities in comparative hearings, are not new. However, the Policy Statement does tend to restrict the scope somewhat of existing factors and if undue delay in the disposition of comparative broadcast hearings is thus prevented, some good will have been accomplished.

I wish to make clear that my concurrence here does not bind me with respect to the weight I might see fit to put upon the various criteria in a given case. For example, while I recognize the problem of diversification of the mass media, I also recognize some counter balancing in the ad-

vantages of common ownership of a radio station and a newspaper. I am also persuaded that the public interest may be served by the common ownership of a radio station and a CATV system in the same market. In other words, if it should appear to me in a given proceeding that the owner of a newspaper or of a CATV system would do the better job of serving a particular community, I would not be so concerned with the composition of such an applicant that I would select another that was not "tainted" with the media of mass communication.

[1920] Historically, a prospective applicant hires a highly skilled communications attorney, well versed in the procedures of the Commission. This counsel has a long history of Commission decisions to guide him and he puts together an application that meets all of the so-called criteria. There then follows a torturous and expensive hearing wherein each applicant attempts to tear down his adversaries on every conceivable front, while individually presenting that which he thinks the Commission would like to hear. The Examiner then makes a reasoned decision which, at first blush, generally makes a lot of sense—but comes the Oral Argument and all of the losers concentrate their fire on the "potential" winner and the Commission must thereupon examine the claims and counter claims, "weigh" the criteria and pick the winner which, if my recollection serves me correctly, is a different winner in about 50 per cent of the cases.

The real blow, however, comes later when the applicant that emerged as the winner on the basis of our "decisive" criteria sells the station to a multiple owner or someone else that could not possibly have prevailed over other qualified applicants under the criteria in an adversary proceeding. It may be that there is no better selection system than the one being followed. If so, it seems like a "helleva way to run a railroad", and I hope these few comments may inspire the Commission to find that better system even if it requires changes in the Communications Act.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 4 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 647

SOUTH FLORIDA TELEVISION CORPORATION, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, and L. B. WILSON, INCORPORATED, *Respondents*

On Petition for a Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT L. B. WILSON, INCORPORATED IN OPPOSITION

ROBERT A. MARMET
EDWIN R. SCHNEIDER, JR.
MARMET & SCHNEIDER
1822 Jefferson Place
Washington, D. C. 20036
Attorneys for Intervenor, L. B. Wilson, Incorporated

PAUL A. PORTER
REED MILLER
ARNOLD & PORTER
1229 19th Street, N. W.
Washington, D. C. 20036
Of Counsel

November 4, 1965

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Reports Below and Jurisdiction	1
Questions Presented	2
Statute	2
Statement	2
Argument	4
Conclusion	8

CITATIONS

Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327 (1945)	7, 8
Community Broadcasting Co. v. Federal Communications Commission, 107 U.S. App. D.C. 95, 274 F. 2d 753 (1960)	7, 8
Evangelical Lutheran Synod v. Federal Communications Commission, 70 U.S. App. D. C. 270, 105 F. 2d 793 (1939)	6
Hearst Radio, Inc., 6 Pike & Fischer RR 994	6
L. B. Wilson, Inc., 37 FCC 511 (1964)	4
Wabash Valley Broadcasting Corp., 1 Pike & Fischer RR 2d 573 (1963)	6
WKAT, Inc., 29 FCC 216 (1960)	3
WKAT, Inc. v. Federal Communications Commission, 111 U.S. App. D. C. 253, 296 F. 2d 375 (1961), cert. denied sub nom. Public Service Television, Inc. v. Federal Communications Commission, 368 U.S. 841 (1961)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 647

SOUTH FLORIDA TELEVISION CORPORATION, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, and L. B. WILSON, INCORPORATED, *Respondents*

On Petition for a Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT L. B. WILSON, INCORPORATED IN OPPOSITION

REPORTS BELOW AND JURISDICTION

The statements contained in the petition for a writ of certiorari in this case concerning opinions below and jurisdiction are considered adequate.

QUESTIONS PRESENTED

Respondent L. B. Wilson does not agree with the petitioner that the question concerning a preference to a renewal applicant because of incumbency *per se* is properly presented in this case, since the decision of the Federal Communications Commission did not involve this question. The respondent respectfully suggests to this Court that the issue presented by this case is as follows:

Whether the Federal Communications Commission accorded a fair hearing to all applicants in this case, considered all relevant facts, evaluated the claims of the competing applicants, adequately explained the reasons for its ultimate conclusion and rendered a decision within its authority to select among competing applicants in accordance with the public interest, convenience and necessity.

STATUTE INVOLVED

Relevant provisions of the governing statute have been set forth in the petition.

STATEMENT

Although the respondent cannot adopt the petitioner's statement of the facts in this case, a full counter statement of the facts would be unnecessarily long and might obscure the differences between respondent's and petitioner's view of this case. Consequently, the respondent accepts for purposes of discussion the petitioner's statement, with the following important modifications and additions:

Although it is not actually relevant to this appeal, the respondent cannot accept as factual the opinion

set forth in the petition (Pet. 3) that the Commission decided in 1957 that L. B. Wilson, Incorporated (sometimes hereinafter referred to as Wilson) was the least qualified of the four applicants who originally competed for Channel 10. The decision upon which the petitioner relies for this statement of opinion was set aside by the Commission because of unlawful attempts to influence the Commission. *WKAT, Inc.* v. *Federal Communications Commission,* 111 U.S. App. D. C. 253, 296 F. 2d 375 (1961), *cert. denied sub nom. Public Service Television, Inc.* v. *Federal Communications Commission,* 368 U.S. 841 (1961). A decision of this nature should not be used to support such an expression of opinion. Significantly, one Commissioner found Wilson the best qualified applicant at that time. *WKAT, Inc.,* 22 FCC 117, 210.

The petitioner's reference (Pet. 3-4) to a grant "by default", is taken out of context and might be misleading. Actually, the Commission stated, in granting the Wilson application for a construction permit: "The Commission is, however, aware and has considered that the peculiar circumstances of this matter have resulted in a *type of award by default.* Consequently, the *license period* contemplated herein will be for four months subsequent to construction, rather than for the three year period which has been customary." *WKAT, Inc.,* 29 FCC 216, 218 (1960) (emphasis supplied).

The Commission order of February 16, 1962 (Pet. 4) directed Wilson to file an application for renewal of its license by March 20, 1962, and recognized that since Wilson had operated for less than a full year, it would not be able to utilize the normal composite week in furnishing to the Commission information on *past program performance.* A special week was

specified so that such information on past licensee performance could be considered in passing upon this application for renewal (J.A. 5-7).[1]

The petitioner's characterization of the Commission's summarization of its preference for Wilson is misleading. By quotation out of context, it incorrectly portrays the weight which the Commission attached to Wilson's past broadcast record. Full quotation is required to state accurately the basis for the Commission's preference for Wilson:

> "It has achieved a combination of factors in no way approached by any other applicant. Majority stockholders having local residence, local civic associations, and many years of broadcast experience would be integrated on a full time basis. These stockholders would hold positions enabling them to bring to bear in the operation these qualifications on both a policy level and on the day to day operations of the station. *Unnecessary to establish this superiority,* but adding somewhat thereto, is its past broadcast record." *L. B. Wilson, Inc.,* 37 FCC 511, 523 (1964) (emphasis supplied).

It also must be noted that Wilson was the only applicant in the proceeding with a past broadcast record, and that the Commission's preference for Wilson was based in part upon operation of a standard broadcast station and was held to be "minor in nature". (37 FCC at 521-522).

ARGUMENT

The issue which the petitioner seeks to present to this Court is not properly in this case at this stage.

---

[1] The reference is to the Joint Appendix included in the certified record before this Court.

It is true that questions concerning Wilson's status as a renewal applicant and the question of Wilson's right to demonstrate its record of past performance were raised before the Commission. However, this case was decided by the Commission and affirmed by the Court on grounds unrelated to the question which the petitioner seeks to raise. The Commission's award to Wilson was based upon application of traditional criteria employed by the Commission in selection among competing applicants. These criteria are not attacked by the petitioner. This reasoned and reasonable judgment of the agency charged with primary responsibility in such cases was affirmed by the Court of Appeals after a careful review of the petitioner's contentions.

Arguing primarily from conjecture, the petitioner has sought to establish a "consistent" practice of the Commission to favor an incumbent licensee seeking a renewal. If such practice does indeed exist, and petitioner has not established that it does, the practice had no effect upon the Commission's decision in this case.

A. This case presents no question of violation of the Communications Act

The petitioner's argument in support of its request for a writ of certiorari is dependent upon its attempts to establish (1) that it is the consistent practice of the Commission to favor an incumbent licensee seeking renewal and (2) that the Commission unfairly followed this practice in this case. This contention is supported only by conjecture concerning Commission policy and an erroneous view of the Commission's action in this case.

As the Commission observed in its brief before the Court of Appeals in this case (Pg. 15, fn 3) the only "favorable position" which a renewal applicant occupies in competition with a new applicant for the same broadcast facilities, "stems from the probative weight attached to his demonstrated record of performance as against the untested promises of the new applicant." *Wabash Valley Broadcasting Corp.*, 1 Pike & Fischer RR 2d 573 (1963), *Hearst Radio, Inc.*, 6 Pike & Fischer RR 994 (1951).

Contrary to the petitioner's contention, no "clear" Commission policy favoring incumbency *per se* has been established. In the trial of this case before the Commission, Wilson sought to establish that such a policy did and should exist, relying in part upon cases cited by the petitioner.[2] The Commission did not accept this view of the case. No inherent preference was accorded to Wilson as a renewal applicant.

The Commission's decision was based upon application of those established comparative criteria traditionally utilized in selection among competing applicants for broadcast facilities. Wilson's superiority over the other three applicants was based upon the fact that a controlling majority of its shareholders with close local identification and many years of broadcast experience would bring their skills directly into the operation of the station on a day-to-day basis. Wilson's past performance in operation of the station was not even necessary to establish this superiority. In contrast by way of example, petitioner South Florida Television Corporation (South Florida) was controlled by

---

[2] See *Evangelical Lutheran Synod* v. *Federal Communications Commission*, 70 U.S. App. D.C. 205, 105 F. 2d 793 (1939) and cases cited by petitioner (Pet. 8, 9).

an 80% stockholder with absolutely no broadcast experience whose testimony concerning proposed participation in operation of the station was found by the Commission to be incompetent to establish a definable degree of participation in station operation (37 FCC at 520). Under these circumstances, it is not surprising that the Court of Appeals found that the Commission's decision "was the result of a reasoned and reasonable judgment of the agency charged with primary responsibility in the matter." The court below has fully considered the petitioner's contentions on appeal and rejected them.

B. The petitioner was accorded a full and fair hearing by the Commission

Contrary to the petitioner's contention, there is no conflict between this case and the decisions of this Court and the Court of Appeals in the *Ashbacker*[3] and *Community*[4] cases. These cases established the proposition that when two or more parties apply for a *new* facility, the Commission may not issue operating authority to one pending the outcome of a hearing except under extraordinary circumstances. They are unrelated to the facts in this case.

Wilson's application was first filed in 1953. After a complicated course of litigation, it was granted in 1960. The grant contemplated a limit upon the term of the license, but specifically provided for licensed operation. Wilson went on the air on Channel 10 in Miami in November of 1961, before the petitioner corporation was even formed. When the Commission

---

[3] *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327 (1945).

[4] *Community Broadcasting Co.* v. *Federal Communications Commission*, 107 U.S. App. D.C. 95, 274 F. 2d 753 (1960).

ordered Wilson to file an application for renewal of license in February of 1962, it specified special days which Wilson should use to demonstrate its past performance. This is the same order which set the date for filing of the petitioner's application. Under these circumstances petitioner's claim that it was unfairly prejudiced by the Commission's consideration of Wilson's past programming cannot be considered seriously. It had clear notice that the Commission planned to consider Wilson's programming performance in connection with its renewal application. The *Ashbacker* and *Community* cases cannot be construed to require that the Commission must ignore the past performance of an applicant for renewal of license. In any event, the Commission's decision in this case did not turn upon a question of past performance. The petitioner's claim of prejudice lacks foundation in the record of this case.

CONCLUSION

This case concerns no important question warranting review by this Court. The unusual factual circumstances which resulted in the initial award to Wilson are not likely to recur with any frequency. The petition for writ of certiorari should be denied.

ROBERT A. MARMET
EDWIN R. SCHNEIDER, JR.
MARMET & SCHNEIDER
1822 Jefferson Place
Washington, D. C. 20036
Attorneys for Intervenor,
L. B. Wilson, Incorporated

PAUL A. PORTER
REED MILLER
ARNOLD & PORTER
1229 19th Street, N. W.
Washington, D. C. 20036
Of Counsel

November 4, 1965

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	10

CITATIONS

Cases:	
Ashbacker Radio Corp. v. *Federal Communications Commission*, 326 U.S. 327	4, 9
Community Broadcasting Co. v. *Federal Communications Commission*, 274 F. 2d 753	9
Federal Communications Commission v. *Sanders Radio Station*, 309 U.S. 470	6
WKAT, Inc. v. *Federal Communications Commission*, 258 F. 2d 418	3
WKAT, Inc. v. *Federal Communications Commission*, 296 F. 2d 375, certiorari denied *sub nom. Public Service Television, Inc.* v. *Federal Communications Commission*, 368 U.S. 841	4
WKAT, Inc., 22 F.C.C. 117	3
WKAT, Inc., 29 F.C.C. 216	3
Statutes:	
Communications Act of 1934	2
Section 307 (d), as amended in 1952	6
47 U.S.C. 307(d)	4
47 U.S.C. 309(a)	4
Miscellaneous:	
S. Rep. No. 44, 82d Cong., 1st Sess	7

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 547

SOUTH FLORIDA TELEVISION CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, AND L. B. WILSON, INCORPORATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-5a) is reported at 349 F. 2d 971. The decision of the Federal Communications Commission (Pet. 6a-27a) is reported at 37 F.C.C. 511.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the decision of the Commission, was entered on July 8, 1965. The petition for a writ of certiorari

was filed on October 5, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 47 U.S.C. 402(j).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's decision to grant a renewal application for a television broadcast license violated the provision of the Communications Act which states that no license "shall be construed to create any right beyond the * * * periods of the license."

2. Whether the Commission's consideration of a renewal applicant's broadcasting record violated the provisions of the Communications Act which require the Commission to grant licenses only in the "public interest, convenience and necessity."

3. Whether petitioner was denied a fair and impartial hearing because the Commission considered the broadcasting operations engaged in by the incumbent licensee.

STATUTE INVOLVED

Pertinent provisions of the Communications Act of 1934 are set forth in Appendix C to the Petition, pages 28a–30a.

STATEMENT

This case involves the broadcast license for television Channel 10 at Miami, Florida. Comparative hearings commenced before the Commission in 1953, and on February 7, 1957, the Commission adopted a decision granting the application of Public Service Television, Inc., and denying the three competing

applications, among which was that of L. B. Wilson, Inc. ("Wilson"). *WKAT, Inc.*, 22 F.C.C. 117. The case was appealed to the United States Court of Appeals for the District of Columbia Circuit. That court, without deciding the merits, remanded the case to the Commission (at its request) with instructions to hold an evidentiary hearing on publicly made charges that one or more of the applicants had engaged in improper conduct in attempting to secure an award from the Commission. *WKAT, Inc.* v. *Federal Communications Commission*, 258 F. 2d 418 (C.A.D.C.).

Following an evidentiary hearing, the Commission found that the three applicants other than Wilson had attempted improperly to influence the results of the prior proceeding through *ex parte* approaches; it determined that each of these was disqualified to be a broadcast licensee. The Commission therefore set aside the earlier permit and awarded the permit to Wilson, the sole remaining qualified applicant. *WKAT, Inc.*, 29 F.C.C. 216. Its order provided, however, for a four-month license term rather than the customary three-year term, so that there would be an early reexamination of the qualifications of the grantee and an early opportunity for new applicants, if any, to be considered.

This decision was challenged on appeal by the disqualified parties and by a prospective new applicant, who urged that the Commission should not have licensed Wilson but should instead have accepted new applications immediately. The court affirmed, holding that the Commission's action was "well within its

authority and was a reasonable one." *WKAT, Inc.* v. *Federal Communications Commission,* 296 F. 2d 375 (C.A.D.C.), certiorari denied *sub nom. Public Service Television, Inc.* v. *Federal Communications Commission,* 368 U.S. 841.

After four months of operation, Wilson filed its application for renewal. Three other applications (including petitioner's) for the same channel were also filed within the time specified by a Commission order. The four applications were designated for hearing to determine, on a comparative basis, which of the proposed operations would better serve the public interest, convenience and necessity. 47 U.S.C. 307(d), 47 U.S.C. 309(a); *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U.S. 327.

After a full evidentiary hearing, an examiner's initial decision, the filing of exceptions thereto and oral argument before the Commission, the agency granted Wilson's application and denied the competing applications (Pet. App. 6a–26a, 37 F.C.C. 511). The principal bases for the decision were Wilson's integration of ownership with management, and its broadcast experience (Pet. App. 25a). The majority of its stock was held by individuals, Miami residents, who would participate actively in the day-to-day affairs of the station (Pet. App. 19a–22a, 25a–26a). The Commission also found that Wilson's long broadcast record as licensee of a radio station in Cincinnati was satisfactory. Its operation of Channel 10 had "many commendable aspects" but the Commission weighed this "in the light of the unusual circum-

stances" that the station had been on the air for only a short period of time and its record had been compiled with knowledge that the station's application for renewal would probably be contested by other applicants (Pet. App. 22a–23a). The Commission concluded, therefore, that the past broadcast performance had only "minor" significance (Pet. App. 23a), although it added "somewhat" to the superiority found on other grounds (Pet. App. 26a).

The major contention on appeal was that the Commission erred in considering Wilson as a licensee seeking renewal, and that, instead, Wilson should have been considered merely a temporary operator, with no favorable consideration being given to it by reason of its previous operation of the channel. In a *per curiam* opinion, Senior Circuit Judge Edgerton and Judge Fahy held that it was not improper for the Commission to accord Wilson the status of a licensee and that the applicant received no "unfair advantage" from being so considered. The court concluded that all factors necessary to a decision had been considered by the Commission and the result reached was "a reasoned and reasonable judgment of the agency charged with primary responsibility in the matter" (Pet. App. 4a). Judge Wright dissented on the ground that an incumbent licensee is not entitled to "a preferential position" when seeking renewal.

ARGUMENT

Both Judge Wright in dissent and petitioner in contending that this Court should grant certiorari errone-

ously treat this case as one in which the Commission based its award, either in whole or in part, on an applicant's status as an incumbent licensee. An examination of the Commission's opinion discloses, rather, that the Commission relied entirely on permissible factors in assessing the merits of the competing applicants, and that Wilson's incumbency was relevant only insofar as it demonstrated a certain level of broadcasting performance—and even for that limited purpose, it was accorded little weight.

1. Whenever a broadcast license expires, "channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public" and that interest includes "the ability of the licensee to render the best practicable service to the community reached by his broadcasts." *Federal Communications Commission* v. *Sanders Radio Station*, 309 U.S. 470, 475. If applications in addition to the incumbent's renewal request are filed, all are consolidated for a comparative hearing, and in that hearing the past record of the incumbent, as well as the records of competing applicants, are relevant.[1] It would ob-

[1] The Commission's approach in this case is plainly consistent with the intent of Congress in this matter. The 1952 amendments to the Communications Act contained a substantial revision of Section 307(d) dealing with renewal of broadcast licenses. Although the law relieved broadcasters of certain requirements as to the submission of information at renewal time, the legislative history expressly provided for a consideration of the past record of the licensee. The Senate Report states: "It should be emphasized that while the recommended amendment does eliminate the necessity for the type of involved and searching examination which the Commission must make in

viously be appropriate in such a hearing for the Commission to consider the inadequacies of an incumbent's performance during the original license period as a factor militating against renewal. It is correspondingly proper for the Commission to weigh in a renewal applicant's favor the commendable aspects of his performance record. That is all the Commission did in this case. It did not, as petitioner suggests, accord any weight to Wilson's existing license *per se*.

This is apparent from the Commission's opinion. The Commission held that Wilson's status was that of a licensee and not that of a mere temporary operator, but that this status would be given limited weight because of the short duration of the license and Wilson's foreknowledge that its license would be up for renewal after four months (Pet. App. 12a). These two considerations patently affect the weight to be accorded Wilson's status only if the quality of its performance during that period is the relevant measure; if mere status as an incumbent licensee was the criterion which the agency used, the fact that the licensee knew that his authorization would expire in four

---

granting an original license, it does not in any way impair the Commission's right and duty to consider, in the case of a station which has been in operation and is applying for renewal, the over-all performance of that station against the broad standard of public interest, convenience, and necessity. This authority of the Commission is made explicit by specifying that such renewal grants are subject to findings by the Commission that the 'public interest, convenience, or necessity would be served thereby.'" Sen. Rep. No. 44, 82d Cong., 1st Sess. (1951), p. 7.

months would not bear in any manner upon that status.

This reading of the Commission's opinion is further supported by the Commission's discussion of "Past Broadcast Performance" (Pet. App. 22a–23a), where, in terms similar to that used in the earlier portion of its opinion, the agency observed that the usual "persuasive evidence" of past broadcast performance was limited in this case by "the unusual circumstances under which it was compiled" (Pet. App. 23a). Nor was any reference made in the Commission's "Summary" (Pet. App. 25a) to licensee status as such. The Commission enumerated, *inter alia*, "past record of broadcast performance" as one criterion but noted, *with reference to that factor alone*, that "it cannot be accorded the normal significance * * * in view of the circumstances under which this record, particularly in Miami, was made" (*ibid.*).

Consequently, even assuming, *arguendo*, that it would have been impermissible for the agency to consider incumbency *per se* as a factor in awarding a comparative license, that course was not followed here. A reading of the complete opinion, we believe, demonstrates conclusively that licensee status was considered relevant only insofar as it established a record of prior broadcast performance.

2. There is no merit to the claim that the Commission violated the Act's policy of free competition for broadcast licenses by considering the record of an in-

cumbent licensee. Indeed, the "public interest, convenience, and necessity" demand that the Commission assess the performance of the renewal applicant with respect to the license sought to be renewed. Both *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327, and *Community Broadcasting Co.* v. *Federal Communications Commission*, 274 F. 2d 753 (C.A.D.C.), on which petitioner relies, concerned temporary grants without comparative hearings to one of two competing applicants—a course which was held impermissible in the absence of a clear showing of public need. In the present case comparative hearings have been held, and the award has been made by the Commission on the basis of established and approved criteria.

3. Nor is there substance in the claim that the Commission unfairly relied on operations engaged in during the pendency of the hearings. The Commission held that its examiners had erred in excluding a "supplemental showing" of "performance for the entire period of [Wilson's] stewardship," but it found the error to be nonprejudicial (Pet. App. 12a–13a). There is no indication in the Commission's opinion that it relied on any performance beyond the 4-month record which the examiner admitted into evidence (Pet. App. 22a), and no basis whatever for supposing that what Wilson was doing during the hearing affected the result reached by the Commission.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
LIONEL KESTENBAUM,
Attorney.

HENRY GELLER,
General Counsel,
JOHN H. CONLIN,
Associate General Counsel,
LENORE G. EHRIG,
Counsel,
Federal Communications Commission.

NOVEMBER 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965